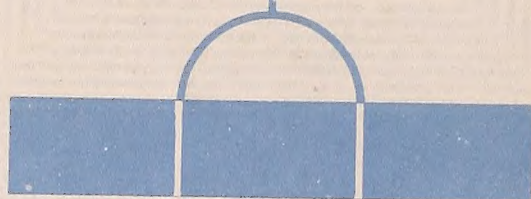


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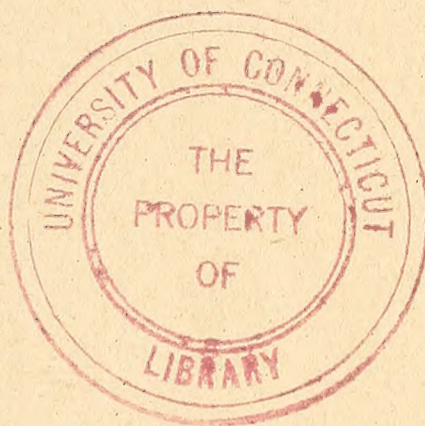
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Current Cumulative Pocket Parts

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VOLUME 3

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matter in bar, if well pleaded, and not traversed or avoided, is admitted, 2 R 205

—judgment arrested if jury find for plaintiff, 2 R 205

facts stated by way of inducement to a material traverse are not traversable; and the party, by joining issue on the facts traversed, does not admit the truth of the inducement, 3 D 231

general issue admits capacity of company to sue, and its organization and existence, 14 C 439, 27 C 282, 29 C 148

—does not admit power of foreign company to make the contract relied on, 14 C 440

defendant may not plead matter admitted by previous plea, whether admitted expressly or impliedly, 19 C 487

—rule the same in civil and criminal cases, 19 C 487

—aliter, in indictment for felony, 19 C 487

defendant’s pleadings *held* to have admitted that railroad petition was brought by authority of railroad company, 57 C 97

—and later pleadings could not challenge such authority, 57 C 97

where pleading first admits, and then denies, same allegations, former governs, 64 C 556, 73 C 83, 82 C 592

effect of admission in pleading, 69 C 1, 82 C 592, 84 C 202, 85 C 215, 221

effect of admitting due execution, 74 C 224

answer not replied to regarded as true, 77 C 226

assignee of a note who sues to foreclose but does not produce note, can, when it is admitted in the answer, rely on presumption that it exists, 81 C 415

to a complaint on common counts for work and labor, defendant filed general denial, also special contract; *held* that employment is admitted, 82 C 592

where answer alleges or admits facts, they need not be proved, though general denial also pleaded, 82 C 592

—an admission in pleadings is equivalent of and dispenses with proof, 82 C 592

allegation of title and admission in answer makes it true, 83 C 204

plaintiff suing for work done under a special contract and admitting that it was not completed, cannot recover, 83 C 308

admission by executor that claim was duly presented dispenses with proof, 84 C 202

admission in answer that notes were indorsed is an admission of an authorized indorsement, 85 C 147

if sale alleged and admitted in answer, court cannot find there was no sale, 85 C 215

by default, truth of allegations of complaint are admitted, but not of a substituted complaint setting up a new cause of action, 86 C 308

defendant who appears voluntarily and late, can object to erroneous action previously taken, 86 C 308

judgment non obstante veredicto is one of confession on the pleadings; improper if pleadings are solely denials of allegations of the complaint, 87 C 527

allegations in answer, not replied to, are taken as true, 89 C 229

failure of defendant to specifically deny execution and delivery does not permit recovery on a forged note, 89 C 592

admitting, in answer, plaintiff’s incorporation, does not permit one to urge the contrary on appeal, 89 C 616

if memorandum of decision in a former case appears in a complaint and is admitted, it can be considered in determining flaw in the title, 90 C 546

where statement alleged to be libelous is admitted, no need to prove it, 91 C 431

allegations admitted by both parties are not in issue, 92 C 226

in admitting allegation that one tendered entire balance of purchase price, one is prevented from claiming lack of tender of interest, 92 C 693

where one paragraph of answer admits contract set up in complaint, and a later paragraph sets up a part only of the contract which the reply impliedly admits, court

§ 4 Pleading

- can give full effect to earlier admission, 93 C 239
- repugnancy should be corrected before trial, 93 C 239
- admission of plaintiff's ownership of land "bounded by a highway," admits a highway boundary, but not its location or limits, 98 C 398
- party entitled to advantage of correct construction of admitted facts, even though he offers evidence on another theory, 100 C 737
- permitting evidence to come in does not derogate from effect of admissions in pleading, 100 C 747
- admission contained in overruled pleading of no effect, unless paper is offered in evidence, 104 C 519
- answer refusing to answer allegations as immaterial is nugatory and in effect an admission of them, 111 C 317, 324
- where nature of structures alleged were admitted by answer, issue was laid out of case; finding inconsistent therewith must be displaced by admitted statement from complaint, 117 C 249
- in action against single defendant, facts which are admitted by answer are not in issue at trial, 129 C 10
- but where two defendants, admission of one not binding on other and issue should be submitted to jury, 129 C 10

§ 5. Construction of Pleadings

- "aforesaid" does not necessarily refer to last antecedent, K 29
- words are construed most strongly against pleader, 5 C 438, 6 C 137
- averment of receipt as bailiff *held* to import averment of delivery on request of defendant, 11 C 425
- allegation that dog was a stray and running at large, *held* equivalent to averment that dog was not under care of anyone, 61 C 1
- pleadings to be construed against pleader, 66 C 45, 67 C 502, 82 C 592
- repugnancy will cause this rule to operate, though it is waived, 73 C 83, 82 C 592
- action on judgment; allegation that a thing was "duly adjudged" means what, 67 C 91
- allegation that defendants "bound themselves," in action on bond, implies delivery, 67 C 497
- "belonging to" as allegation of ownership, 69 C 4, 73 C 288
- allegation that a bond was "executed" implies delivery, 73 C 740
- whole pleading to be read together, 75 C 177, 85 C 526

- action for money loaned "as evidenced by note" not an action on the note, 75 C 254
- complaint for injury due to fall of elevator *held* not to describe duty as that of carrier of passengers, 76 C 317
- allegation that trustee's accounts were allowed "upon due hearing," and that trustee acted "under the orders and advice" of the court, does not sufficiently allege notice, 77 C 70
- allegation that judgment was "duly rendered," distinguished, 77 C 70
- prayer for conveyance means by deed, 77 C 389
- complaint as to sale of personal property *held* to allege breach of warranty, not fraud, 79 C 126
- to be reasonably construed to give effect to general theory on which they proceed and to do justice, 79 C 257, 84 C 302, 85 C 526
- complaint construed not to mean a violation of contract relations but of alleged equitable rights, 81 C 189
- answer *held* to allege active fraud, not fraudulent concealment, 81 C 252
- complaint to be read in connection with exhibits, not literally, 81 C 668
- allegations in one count, setting forth action against landlord and contractor for fall of building, construed to be one for injury to personal property, not for fraud, breach of warranty or tort accomplished by force, 82 C 578
- court will not construe complaint so as to make it a joinder of causes of action not legally joinable, 82 C 580
- act of one not treated as act of others unless he is alleged to be agent of the others, 83 C 120
- complaint for sale of wood and agreement of indemnity if wood was on land of another, construed to be separate transactions, 84 C 437
- in an action on a note, allegation of indorsement on or before negotiation excludes one thereafter, 85 C 147
- negotiation is a description of all acts whereby instrument is put into circulation, 85 C 147
- in complaint for leaving a horse unattended in a street and that he was vicious, there are two acts of negligence, 86 C 301
- "F. G. now of parts unknown, County of New Haven," construed to be not a proper description of a nonresident, 86 C 335
- on demurrer, *held* that complaint alleged continuance of a contract, 87 C 23
- to be construed in view of the decisions existing when drawn, 87 C 639
- question is not what pleader intended, but real effect of pleading, 87 C 639

- where provisions of a charter are set forth with the statement that it is plaintiff's duty to protect its rights, there is no assertion of a bare legal duty, 88 C 677
- in alleging that one's land contained one hundred and forty acres, more or less, and that the assessors listed it as one hundred and seventy-five, there is no discrepancy, 89 C 435
- having alleged a party's "sole intent," unnecessary to allege what he did not intend, 89 C 672
- allegations as to negligence and careless conduct might justify finding of wanton misconduct, 91 C 314
- a complaint that alleges contract to sink a well, defendant to supply tools, and injury to plaintiff by defective tool, is one based on a contract, not one of master and servant, 91 C 425
- allegation that note was payable to A attorney is supported by proof of note payable to bearer and evidence that A was attorney, 91 C 598
- allegations of complaint construed in the light of a more specific statement; denials in answer are given a like construction, 92 C 293
- admission of tender of entire amount due, precludes attack on tender as not including interest, 92 C 693
- legal nature of transaction disclosed, not name given it, controls, 93 C 61
- "mortgage" read in place of "trust," 93 C 64
- complaint alleging sale, its terms, delivery, and notice thereof, and failure to honor draft and accept bill of lading, states a cause of action on an executed sale, 93 C 211
- allegation setting up fall of a cornice due to negligence in putting it on and failure of owner to inspect it, construed to mean that proximate cause was failure of owner to inspect, 93 C 604
- allegations that defendant bank knew the circumstances, construed, where seller, and bank that received the money on draft and bill of lading, are sued jointly on breach of warranty, 95 C 301
- a complaint, by alleging that damage was caused by negligent action after a barge went ashore, *held* to exclude negligence in allowing it to break away from tug, 95 C 486
- answer signed by "Defendants" *held* to mean those entitled to answer, not one whose demurrer has been sustained, 96 C 497
- operation of automobile by "defendants and by the defendants agent" defectively alleges operation by agent, 97 C 149
- answer *held* to set forth breach of contract not fraud, 97 C 345
- where doubtful, pleadings will be construed to give effect to general scheme and to do justice, 97 C 345
- allegations of fraud not to be supplied by conjecture or remote implication, 97 C 345
- allegation of "no knowledge or information," etc., is, in effect, a denial, 98 C 393
- in allegation that defendants "conspiring together to cheat and defraud" plaintiff induced others to commit burglary, words quoted were disregarded as surplus, 98 C 810
- allegations of specific acts of negligence should receive reasonably comprehensive construction, 99 C 9
- allegation that motorist did not drive "lawfully" covers violation of any statutory rule, 100 C 551
- notation on copy of contract annexed to complaint "acceptance and variations made by parties by correspondence after date of order" justified admission of evidence as to change not otherwise pleaded, 100 C 719
- allegation that maker had possession of note with payee's indorsement equivalent to allegation that persons with knowledge of such possession had notice that indorsement was for accommodation, 101 C 465
- allegation that defendant caused injury after it "knew" of danger of plaintiff does not restrict proof to actual knowledge, 102 C 682
- complaint construed to set up common-law liability of husband for rent of tenement supplied wife, not action under statute, 102 C 703
- charge *held* not to leave the construction of pleadings to the jury, 103 C 267
- on appeal, pleadings treated on same theory as in trial court, though defective, 105 C 476
- complaint setting up failure to return note as agreed *held* to be open to construction as for breach of contract or conversion, 107 C 580
- though pleading contains allegations of fraud it may be good as one for mistake, 109 C 292
- cross-complaint construed to set up mistake on one side and inequitable attempt to take advantage of it on other, 109 C 292
- complaint for reformation for mistake to be liberally construed to give effect to equities of case, 109 C 292
- where no attempt made to clarify complaint and general denial is filed, it will be given a reasonably comprehensive construction to support judgment, 110 C 68
- complaint for accounting, *held* to embrace only matter alleged, and not to include acts under annexed power of attorney, 112 C 364

§ 5 Pleading

in pauper action where allegations of settlement were negated by facts, no basis for judgment, 116 C 539

—but where by tacit consent of court and counsel complaint was interpreted to include question of whether liability attached on any ground, it was so treated on appeal, 116 C 539

complaint alleging money loaned with no intent to charge usurious rate despite fact that note specified such rate, could not be construed as alleging parol agreement collateral to loan, as contended by indorsers, 118 C 1

where tenant in common sued for accounting of “moneys collected as rents” by cotenant who “acted as manager” of property, action was for rents actually received, not for sum representing fair rental value, 118 C 12

complaint construed as one based on conversion, 118 C 158

complaint must be read in light of plaintiff’s legal claims, 119 C 514

in action of accounting, defense “fully accounted” means a full account has been rendered, not that all money received has been properly expended, 120 C 184

of special defense adopted by trial court sustained, 120 C 223

term “due” as employed in complaint and answer correctly construed as meaning mere indebtedness without reference to time of payment; as synonymous with “owing,” and including a debt payable in future, 120 C 223

special defense construed to involve separate defense that extensions of note were granted beyond reasonable time, 121 C 414

where complaint alleged that defendant was negligent in driving his car recklessly, it was one based on negligence, 123 C 205

—court did not need to charge as to issue of recklessness, 123 C 205

interpretation of complaint by wording and procedure thereunder by plaintiff was that defendant’s truck was stationary at time of accident and that that fact caused accident, 124 C 13

claim that because tar road was alleged to extend from bridge latter was not part of state-aid highway untenable, where it was at all times described as such, 124 C 678

allegation that bank accepted receipts in lieu of presentation of deposit book in effect asserted claim of waiver of such presentation, 128 C 518

complaint construed to set up only statutory and not common-law duty of street railway to keep safe its rails, 129 C 697

§ 6. Complaint

§ 7. —In General

surplusage does not affect declaration if it is substantially good, 1 R 457

issue in fact closed to court, where declaration is insufficient, 5 D 53

—issue to be decided, then if necessary, judgment may be arrested, 5 D 53

special contract as inducement; proof required, 1 C 179

plaintiff must declare according to his title, 3 C 207

—in simple contract need not declare as survivor, 3 C 207

need not anticipate what defenses, in action on bond, 14 C 329

unnecessary averments become material, when, 14 C 426

a word illegible in declaration may be treated as if no word was there, though count is thereby rendered defective, 28 C 551

office of complaint to apprise defendant fully and fairly, 38 C 520

writ “in a plea of the case” does not per se make declaration in case, 41 C 542

—later averments may show it to be in debt, 41 C 542

newly admitted coplaintiff need not always file new complaint, especially if original complaint covers his claim, 54 C 237

where complaint shows complete cause of action, it is immaterial that another cause is disclosed in the same count, 58 C 549

term “complaint” is as applicable to equity as to law, 60 C 213

complaint should fairly apprise defendant upon what grounds plaintiff claims damages, 63 C 486

—plaintiff should be confined in his recovery to the grounds so stated, 63 C 486

—cannot recover for negligent injury on complaint simply alleging a conversion, 63 C 486

in habeas corpus where mittimus is made part of return regular rules of pleading must be observed, 67 C 349

—petitioner cannot deny truth of facts in return and at same time question legal sufficiency, 67 C 349

should not anticipate defense, 73 C 477, 77 C 638, 81 C 287

where material facts appear court will give proper relief, legal or equitable, 77 C 383

substitution of the complaint by another wherein one of the parties is dropped is within discretion of court, 81 C 702

consolidation of cases is discretionary with court, 82 C 2

complaint stating facts leading up to agreement is subject to erasure by motion; not demurrable as stating distinct causes of action, 82 C 647

recovery rests on facts alleged in complaint, 83 C 59

must allege agency to treat act of one as that of several, 83 C 120

where complaint states a good cause of action and is not demurred to, and no motion in arrest, it is not error to permit recovery on the pleadings, 85 C 512

if complaint does not state a cause of action, other allegations are immaterial, 86 C 180

form of complaint does not of itself determine whether case is criminal, 86 C 191

if complaint shows that damages may arise subsequently to bringing of action, they may be recovered, 87 C 165

allegation that damages for loss of services of a minor are of a continuing character takes them beyond date of the action but not beyond minority of plaintiff, 88 C 710

defect in form of complaint and prayer for relief of no avail in petition to have receivership proceedings held void, 91 C 92

allegation of complaint determines legal character of the action, not the name by which it is called, 93 C 61

complaint set up contract of indemnity while answer made it one to take care of notes; verdict for plaintiff establishes it to be one on contract of indemnity, 93 C 412

never necessary to anticipate a defense, such as the Statute of Limitations, 99 C 307

—therefore court may expunge such anticipatory statements from complaint, 99 C 307

complaint not bad because it included surplusage, 103 C 380

action to recover money loaned not affected by existence of collateral security; nor by allegations in complaint concerning it, 103 C 380

whether complaint for fraud also stated action for breach of contract, *held* not presented on record, 105 C 631

complaint in general terms will support judgment, if proof of cause of action is admissible under it, 106 C 41

effect of failure to move for more specific statement, 106 C 41

when paragraph may be regarded as mere conclusion from preceding allegations or as independent statement, 106 C 642

only one form of complaint for legal and equitable actions; judgment may be rendered upon any right of action alleged, 107 C 207

a plaintiff employee cannot avail himself of facts stated in complaint of employer who joined under Compensation Act, 107 C 687

plaintiff has right to adjudication of cause of action upon demurrer or after issue joined; error to deny this right by refusing permission to file substitute complaint after demurrer to original complaint sustained, 108 C 676

insufficient allegations for fraud action do not vitiate complaint for mutual mistake, 109 C 292

in mortgage foreclosure for unpaid interest, supplemental complaint may be filed, based on subsequent defaults, 111 C 106

plaintiff may state facts in complaint and demand redress for wrongs inferable whether they arise in contract or tort, 114 C 250

ordinarily only proper purpose of alleging that defendant is guilty of reckless misconduct is possibility of avoiding defense of contributory negligence, 116 C 471

—unless it can serve this purpose counsel owe duty not to assert it, 116 C 471

—its assertion subjects plaintiff to possible serious disadvantages by reason of implication of general verdict, 116 C 475

—and court may suggest to counsel that they withdraw the allegation, 116 C 476

allegation that plaintiff's injuries were "due solely" to negligence of defendant's servant did not add anything to burden she assumed of proving absence of contributory negligence, 117 C 607

defendant not entitled to pursue two wholly inconsistent claims in its pleadings, 118 C 190

—as where insurer denied D was driving car at time of accident and in special defense alleged he was assured, i. e., was driving car with permission of owner, 118 C 190

—should be required to elect which ground it will stand on, 118 C 190

though complaint alleges demurrable conclusion, it is not demurrable if subordinate facts alleged do not support this conclusion, 118 C 644

—allegation of "mutual benefit" in negligence action did not bring complaint within guest statute where subordinate facts did not support it, 118 C 644

allegation that L was acting as defendant's agent not waiver of plaintiff's right to rely on statute de presumption of agency, 123 C 460

plaintiff's allegations are measure of his right of recovery, 124 C 214

—so where plaintiff alleged conversion of nineteen hundred and seventy-eight shares of stock pledged by him he could not, without amendment, claim right to recover on ground that some of these shares not pledged, 124 C 214

charge submitting ground of recovery not claimed in complaint or appearing in plaintiff's claims of proof, reversible error, 128 C 635

should allege facts upon which plaintiff proposes to rely so as fairly to apprise court and opposing party as to basis of relief, 129 C 14

§ 8 Pleading

§ 8. —Sufficiency of Allegations

NOTE: For negligence cases see the various titles listed in the cross-references

See also § 16 infra

§ 8(1). In General

need not aver meaning of words, when, K 145
declaration need not aver a matter of defense, 2 R 89

precision necessary in averring special authority, 2 D 418

in action against husband and wife, the ground of her liability must be explicitly stated in the declaration, 4 C 190

need not give notice of facts equally within knowledge of both parties, 14 C 486

action lies on these breaches well assigned, 28 C 544

must allege facts on which legal liability is based, 29 C 1

need not negative a proviso, when, 33 C 419
allegation of duty must set out facts constituting the duty, 34 C 136, 46 C 24, 57 C 514

the particularity essential in making a contract is not necessary in describing it, 54 C 27

complaint need not allege matter necessary only for complete adjudication of rights, 72 C 86

—offsets or partial payments, 65 C 537

a plain and concise statement of the facts relied on is sufficient, 72 C 450, 73 C 5, 83 C 670

whole pleading will be read together, 75 C 177

sufficient for complaint to show prima facie rights; limitations on it are for the defense, 77 C 638

material facts must appear, 79 C 255

complaint need not anticipate defense of condition precedent or limitation of action, 81 C 287

broad conclusion of law insufficient, where facts show it to be unsupported, 81 C 325

sufficiency of complaint not in issue in non-suit, 82 C 236

cannot determine if answer sufficient if it was not replied to, 91 C 354

in application to dissolve an attachment, sufficiency of complaint cannot be determined, 92 C 682

all that is required is that complaint should fairly disclose the cause of action, 94 C 183

not necessary to allege no adequate relief at law in complaint seeking equitable relief, 105 C 84

where facts of complaint imply duty it is not demurrable for failing to allege duty, 114 C 108

when defendant answers essential facts omitted in complaint he supplies defects therein and submits issues to court, 114 C 349

improper allegations cannot destroy legal effect of cause of action properly alleged, 117 C 565

deficiency of parties did not appear where complaint in suit for possession alleged that defendant, who owned property jointly with deceased wife, was her sole heir, 127 C 723

§ 8(2). Notes, Bonds, Insurance Policies and Other Contracts

need not aver notice, if promise is absolute, K 188

need not notice the condition, in an action on covenant, 2 R 89

—nor in action on insurance policy, 8 C 466

—nor in action of debt on bond, 33 C 489

joint and several note must be declared on as such, 2 R 95

need not aver promise within Statute of Frauds to be in writing, 2 R 146

note specifying no time of payment is payable on demand, 1 C 404

must aver notice and request where required by law, 3 C 368, 438

—as to notice of fact peculiarly within plaintiff's knowledge, 13 C 32, 14 C 486

note payable to plaintiff's order is payable to plaintiff, 4 C 247

must correctly state the whole consideration, 4 C 259, 6 C 176, 18 C 79

—so where the consideration is a promise, 12 C 455

—omission not cured by verdict, 12 C 455

need not aver demand at place specified in note, 4 C 465

what averment of agreement to forbear is sufficient, 7 C 527

arbitration note indorsed down to the award by arbitrators, how declared on, 10 C 133

only the entire consideration or act to be done, need be averred, 11 C 326

—pleader need not aver part relating to liquidation of damages, 11 C 326

on promise to account in reasonable time and on request, must aver both, 11 C 431

action on guardian's bond; plea that guardian had rendered his account is insufficient without averring payment, 11 C 559

averments necessary in action on probate bond, 12 C 28

—breach *held* insufficiently set out, 13 C 436

—sufficient averment of neglect to pay over to heirs, 16 C 320

officer's receipt; agreement to deliver to plaintiff, or other proper officer; refusal to deliver to plaintiff *held* well assigned as a breach, 13 C 507

consideration *held* sufficiently alleged when, 14 C 12

must disclose a consideration, 14 C 341

against joint indorsers, good if they are estopped to deny joint liability, 20 C 22

- lease; assignment; notice of organization of company *held* sufficiently alleged, 24 C 77
- deed should be stated, if cause of action is founded on it, 26 C 126
- omission is not merely a formal defect, 26 C 126
- payment at “F. & Mechanics Bank,” may be declared on as “Farmers & Mechanics,” 27 C 184
- breach of promise to discontinue, *held* well assigned, 28 C 544
- promise on past and executed consideration must be averred as made on request, 36 C 1
- what is sufficient averment of contemporary consideration, 36 C 1
- on penal bond; need not aver lapse of reasonable time after demand, when, 37 C 71
- time of making promise must be averred; “heretofore” simply, is not sufficient, 40 C 157
- “for value received” *held* a sufficient averment of consideration as against heirs of lessee for rent, 47 C 366
- on guaranty for rent must aver lessee’s default, 47 C 366
- allegations of special contract to furnish plans and specifications, etc.; the plaintiff to receive “2½ per cent. on estimated cost amounting to \$250,” *held* not defective under Practice Act, as containing no averment of cost or estimate, or how estimate was made, or time for payment, 55 C 437
- averment that to induce payee to accept a note defendant warranted note, is sufficient as to consideration, 55 C 443
- averments in complaint for damages *held* sufficient to authorize a recovery for rent, 55 C 529
- complaint setting out assessment insurance contract and alleging that assessment was not made, *held* sufficient under rule, 58 C 294
- if services for which surgeon sues were rendered by a substitute, this should appear, 72 C 391
- allegations in action of book debt; services of an attorney never entered in a book not recoverable, 78 C 645
- on complaint for breach of contract to furnish bricks for paving, allegation that they were “defective and imperfect” *held* sufficient, 78 C 689
- in contract, general allegation is sufficient to give notice of nature of contract; need not allege promise to take goods on part of vendee, 81 C 484
- complaint on note alleging, by indorsement of defendant, transference to plaintiff, it is not necessary to allege whether it was by special or blank indorsement, 81 C 667
- complaint not demurrable for not alleging plaintiff owner of a nonnegotiable note at the beginning of an action, 82 C 615
- in action on a bond, the receipt of a benefit by the promisor need not be alleged, but he must prove that it was taken by one authorized to do so, 83 C 686
- must plead a new promise to avoid Statute of Limitations, 84 C 138
- if action in contract depends on condition precedent, fulfilment of condition must be alleged, 86 C 180
- ordinarily date of an oral contract for sale of land need not be alleged, 87 C 90
- allegation that “note was duly protested” is a sufficient designation of notice to the indorsers, 87 C 248
- in sales, allegation of special circumstances is necessary in order to increase the damages allowed by the Sales Act on breach of warranty of quality, 88 C 109
- in action on a bond, allegation that bond was given and one had been forced to pay it and had not been indemnified, states a cause of action, 88 C 251
- allegation of an assignment of part of the original judgment is surplusage, 88 C 251
- in action on contract for window locks, the omission of an allegation of the number of locks called for and style, finish, and price, *held* immaterial, 89 C 254
- plaintiff, to recover money paid under contract not enforceable by reason of Statute of Frauds, should set this up and not mere breach of the contract, 90 C 281
- the right to rescind a contract, in case defendant does not put a car in order, should be alleged, 91 C 185
- allegation that consideration was grossly inadequate is insufficient in absence of facts, 92 C 641
- in complaint on an order for payment of money, allegation of indebtedness by drawer to payee states a consideration, 93 C 391
- complaint not demurrable for failure to allege contract was or was not authorized by corporation when this is point in doubt, 93 C 479
- allegation that a contract is improvident unnecessary if it appears to be so in fact, 94 C 276
- if complaint alleges contract by setting up the writings making the offer and acceptance, it can be determined on demurrer whether any such contract existed, 96 C 88
- in action on sealed instrument, consideration need not be alleged, 97 C 195
- in action for rent, landlord need not allege or prove tenant’s possession, 102 C 475
- prayer for deficiency judgment against indorser must be supported by allegations de notice of nonpayment, 102 C 644

§ 8(2) Pleading

- complaint for money laid out and expended, insufficient in action for breach of resulting trust, 106 C 287
- general allegation by insured of fulfilment of all conditions of policy is sufficient, 108 C 164
- duty then on insured to plead specially those on the breach of which it relies, 108 C 164
- claim against estate and complaint based on its disallowance *held* to support recovery based on deceased's voluntarily incapacitating himself from performing agreement, 113 C 449
- waiver of condition in insurance policy must be pleaded, 114 C 335
- no basis in pleadings for judgment for reasonable value of coal claimed to have been sold at agreed price, 114 C 422
- complaint *held* not to sufficiently allege that dividend credited to insurance policy was applied to payment of premium due, 116 C 654
- statements in notice alleged were evidence of this but not sufficient allegations, 116 C 654
- allegations that action of defendant in applying dividend in reduction of premium continued policy, was legal conclusion which did not add to strength of pleading, 116 C 654
- form of complaint *held* not adapted to a judgment for contribution by defendant indorsers, 117 C 24
- but susceptible to amendment appropriate to the alternative claim of joint liability and remedy by way of contribution, 117 C 24
- demurrer to complaint setting forth usurious loan but alleging it was intent of payee to receive only legal rate, should have been overruled, 118 C 1
- allegation that plaintiff is owner and holder of note is sufficient *prima facie* that he is holder in due course with right of recovery, 118 C 112
- amount plaintiff is entitled to recover under agreement to pay by will, is reasonable value of services, not that of property agreed to be left, 121 C 97
- as claim is upon quantum meruit, oral agreements serving merely to overcome Statute of Limitations, failure to allege this agreement not a defense, 121 C 97
- alleged express agreement to devise farm and also that decedent requested plaintiff to care for him and assist on farm and in compliance therewith plaintiff rendered services; *held* sufficient for quantum meruit, 124 C 43
- further statement reciting decedent's promise to give plaintiff home for life in

return for services did not preclude her claiming on implied contract, 124 C 43

services rendered, goods sold; ordinarily not necessary to set forth that debt due remained unpaid, though proper, 125 C 203

allegation in complaint that two notes were for purpose of restitution of shortages and claim of judgment in amount sufficient to pay them, were sufficient to open door to discovery of real purpose of notes, 127 C 144

requisites of complaint on penal bond, 127 C 358

§ 8(3). Jurisdiction; Facts Affecting Right to Sue

- must aver cause to be within jurisdiction, K 27
- must aver that cause in city court accrued in the city; such allegation *held* denied by the general issue, 4 C 376
- what averment of town's interest in support of bastard is sufficient, 7 C 286
- what averment of administrator's right to sue under statute is sufficient, 33 C 460
- one suing as executor need not repeat word "executor" in each count, 39 C 534
- trustee in insolvency to declare how and wherefore he is trustee, 48 C 258
- administrator need not be designated as such in a suit by him upon claim accruing after death of intestate, 53 C 500
- if the ad damnum is within jurisdiction of court, the complaint is not demurrable because alleging some items not recoverable, 54 C 426
- if such items are not legally recoverable, court will reject them on trial, 54 C 426
- where jurisdiction is dependent upon certain prescribed conditions, those conditions must be alleged and proved to give jurisdiction, 85 C 517
- where application to court can be made only if there is disagreement between the parties as to damages, that fact must be alleged to give jurisdiction, 85 C 517, 602
- one must allege one is a bona fide holder of an assignment of a chose in action, 88 C 369
- where complaint does not disclose matter in demand within the jurisdiction, omission is supplied by that fact in answer or cross-complaint, 95 C 66
- that plaintiff was "holder" of negotiable note sufficient, *prima facie*, 111 C 626

§ 8(4). Actions on Statutes

- a private act must be pleaded, 3 C 139
- omission of contra formam statuti, how supplied, 7 C 286
- averment contra statutem unnecessary, when, 11 C 152
- section of the act need not be averred if facts are sufficiently set out, 23 C 356

action on two statutes; conclusion, "contrary to said statutes," *held* proper, 39 C 485
 necessity of counting on statute in action for statutory relief, 69 C 210, 72 C 159, 77 C 569, 80 C 434, 81 C 626, 84 C 47, 86 C 568
 liability for defect in highway within tracks of street railway is statutory; better to refer to statute in prayer for relief, 75 C 694
 statutory remedy is recoverable if statement of facts brings it within it; not necessary to allege that action was brought on statute, 81 C 626, 90 C 527
 to claim treble damages under statute, complaint must show one is entitled to them, and claim must be made in prayer for relief, 84 C 47
 where right of action depends on statute, compliance with its terms must be alleged and proved, 86 C 568
 in charging violation of statute, it is not necessary to negative statutory provisions or exceptions; defendant must claim exceptions, 88 C 353
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 statutory crime should be alleged in the words of the statute; greater particularity is necessary if statute is not clear, 93 C 643
 in action for causing death, not necessary to count on statute if facts bring case clearly within it, 99 C 1
 in action against husband for wife's necessities; allegations of common-law and statutory liability, 102 C 703
 complaint not distinguished between negligence and statutory liability for defect in highway *held* sufficient to sustain recovery for latter, 110 C 68
 in action for damages from defective highway, should distinguish between action for negligence and for penalty for breach of statute, 110 C 68
 though complaint does not recite statute, it is sufficient if it states facts which, if true, give an action under the statute, 116 C 311
 —statute is law of land which parties and court are conclusively presumed to know, 116 C 311
 giving of notice—within sixty days, or if defect consists of ice or snow, ten days—is condition precedent to right of action, and must be alleged unless action brought within time limited for notice, 120 C 499

§ 8(5). Damages

declaration *held* insufficient as giving no rule of damages, when, K 91, 97
 damages not necessarily implied must be averred, 1 C 317
 —so also matter of special damage, 43 C 562, 60 C 61
 —rule strictly adhered to in this State, 43 C 562

in trespass *de bonis asportatis* damages limited to value alleged, 7 C 275
 averment of value and refusal of bailiff to account is a sufficient statement of damages, 11 C 425
 damages presumed from wrong complained of need not be pleaded, 24 C 404
 special damages, to be recovered, must be distinctly averred, 43 C 562, 60 C 61
 special facts showing wanton and unnecessary damage in doing lawful act must appear, 54 C 514
 to recover treble damages, *quaere* whether statute permitting must be referred to in complaint, 59 C 1
 need not allege that plaintiff was "specially damaged" where facts show this, 66 C 413
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 special damages must be specially alleged, 73 C 694, 74 C 544, 75 C 476, 77 C 699
 allegation of failure of duty on part of defendant must be alleged to support judgment for substantial damages, 74 C 46
 vindictive damages recoverable for act of servant only where malice of principal is alleged, 76 C 355
 damage due to rise in value of stock wrongfully sold by broker to be specially alleged, 77 C 517
 where damage implied by law, general averment sufficient, 79 C 189
 complaint must allege special damages, such as loss of business, 82 C 258
 must allege loss of earnings to recover, 83 C 175
 to recover treble damages under violation of law of the road, facts bringing it under the act must be alleged, reference made to the act and treble damages demanded, 84 C 47
 special damages must be alleged only when they are not the necessary and direct result of the injury, 84 C 117
 special damages must be specially pleaded, 84 C 120, 85 C 360
 special damages must be pleaded; special damages defined, 87 C 75
 sufficiency of complaint as to damages is determined by wrong complained of, 87 C 75
 —reason of the rule is that such notice may be given as to prevent a surprise to defendant, 87 C 75
 special damages under Sales Act must be alleged, 88 C 109
 must plead reasonable wages of a chauffeur if one wishes to recover them, 88 C 590
 allegation that injury is of a continuing nature permits recovery after date of commencing action, 88 C 710
 one may allege the profits he might reasonably have expected to have made and the losses

§ 8(5) Pleading

from inability to attend to business, 89 C 697
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to recover double or treble damages, allegations must show that violation of the rule of the road was sole cause of injury, 93 C 247
loss of use of truck not special damage in action for wrongful detention, 94 C 481
inability to follow one's usual vocation provable although no allegation of special damages, 94 C 481
what the elements of loss are and what must be pleaded, 97 C 447
averment de medical and hospital treatment *held* sufficient as to financial loss, 97 C 593
—under allegations items and amount of expenditure can be proven, 97 C 593
allegation that plaintiff prevented from following his regular occupation as policeman permits recovery for time lost or loss of earning capacity, 98 C 606
allegation and proof of special damages, when required in slander action, 98 C 793
special damages defined; when allegations necessary, 106 C 475
damages for destruction of greenhouse constitute special damages and must be so alleged in suit for injunction, 109 C 693
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§ 8(6). Miscellaneous Actions

writ of partition must aver demand; omission not cured by verdict, K 218
what averment of demand in ejectment is sufficient, K 414
—and of debtor's avoidance of bail bond, K 433
must explicitly state ground of married woman's liability; failure not cured by verdict, 4 C 190
need not aver special fact as reason for debt on judgment, 4 C 402
in action of debt for tolls, need not aver demand or notice of authority, 12 C 7
—"defendant is justly indebted," involves notice, 12 C 7
averment *held* sufficient to show a trust and its attempted violation, 12 C 122
acceptance of fund by company may be averred generally, 12 C 122
allegations of date and amount of settlement are matters of substance, 16 C 106
must aver actual possession at time of forcible entry and detainer, 17 C 209
what averment of cause of dam breaking is sufficient, 17 C 249
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acts of force alleged among acts of negligence; action on the case still an appropriate remedy, 28 C 69
informal count in trespass described as case; *held* defect not fatal, 28 C 494
what averments are necessary in suit for contribution, 29 C 1
count for fraudulently disposing of pledge is in tort, 31 C 147
trover by husband as trustee for wife; legal title need not be averred against mere tortfeasor, 32 C 158
wrongful acts in lowering pond; boundary and watering place sufficiently alleged, 33 C 460
averment of title in reversioner, in summary process, *held* sufficient, 35 C 390
trover for wife's chattels, by husband as trustee; husband may describe them as his own estate, 36 C 105
—replication of trust, to plea of levy as husband's, is no departure, 36 C 105
necessary averment of place, in replevin, 37 C 177
need not aver value of land, in ejectment, 42 C 90
averments necessary in action for taking goods of married woman carrying on business, 45 C 416
sufficient averment of lawful issue and use of railroad bonds, 46 C 156
declaration where one codebtor is discharged in bankruptcy, 48 C 32
on quo warranto in contested elections under statute; allegation of mistake in counting and returning votes is insufficient unless averred to prejudice pleader or benefit adversary, 51 C 124
mere conclusion or inference from insufficient allegation is itself insufficient, 51 C 124
—as that relator "received a plurality of the votes cast," 51 C 124
—if sufficient in declaration the details must be shown in replication, 51 C 125
allegation of termination of suit essential for malicious prosecution, 52 C 35
—omission may be supplied from averment of answer, 52 C 35
—whether omission should be attacked by demurrer under Practice Act, *quaere*, 52 C 35
against attorney fraudulently appropriating funds, *held* sufficient under Practice Act, 52 C 65
alleging conveyance of real estate without consideration, upon an understood trust, *held* not demurrable, 53 C 579
claim alleged founded upon expressed and acknowledged trust, the transaction being between husband and wife relative to her sole and separate estate, *held* good, 55 C 214

in a bastardy complaint, failure to aver that prosecutrix is a minor is defect of substance, 58 C 285

—may be reached by demurrer; but too late after trial on general issue, 58 C 285

what averments are necessary in the foreclosure of a tax lien, 58 C 525

—form under Practice Act how affected by statute, 58 C 525

facts averred *held* to state a good cause of action for constructive fraud, 60 C 43

mere allegation of fraud without the facts on which it is based is insufficient, 60 C 51

—it is not essential that the word “fraud” should be used, 60 C 52

mere allegation that party appealing from Probate Court is aggrieved insufficient, 64 C 277

what must be alleged in attack on conveyance as fraudulent, 68 C 580

conditions subsequent in deed need not be pleaded by one claiming thereunder, 74 C 630

allegations, in action for relief from a judgment against a voluntary association, as to understanding of its secretary, and statements of his wife and plaintiff's attorney about the service upheld; allegation that latter “gave him to understand” *held* sufficient, 80 C 642

allegation showing *prima facie* right and equity in plaintiff need not allege express power and authority, 81 C 190

in conversion, precise bill or coin need not be specifically described, 81 C 268

complaint for personal tax must allege that plaintiff is tax collector, that rate bill and warrant were delivered to him and payment demanded and refused, 81 C 367

must allege that act of city in allowing surface water to drain on plaintiff's land was done maliciously and wantonly, 81 C 389

in appealing from disallowance of claim against an insolvent estate, more than filing claim and stating that it is appealed from must be done, 81 C 434

—an amended statement of claim does not change ground of action, 81 C 434

in ejectment date of dispossession not pleaded, 81 C 702

complaint for an accounting by member of a benefit association must contain member's contract with association, 82 C 91

allegation of former ownership and possession of land and conveyance, however defective as statement of title, is not a statement of a defective title, 82 C 567

complaint demurrable for failure to set up facts justifying a conclusion of indebtedness, 83 C 76

in mechanic's lien, allegation that materials were furnished with knowledge and approv-

al of defendant under agreement with subcontractor, is sufficient, 83 C 82

on appeal from railroad commissioners, one can allege that he is aggrieved or claims to be aggrieved without stating details of facts, 84 C 25

allegation that street cars were noisy, ran early and late, and annoyed one, sets up no cause of action, 84 C 450

a town, to recover land fraudulently conveyed, must allege that in making the conveyance it was the intent of the grantor to thereby become a pauper, 84 C 678

mandamus to compel issue of license must allege person is a suitable one; that discretion was abused, 84 C 691

sufficient if fraud may be reasonably inferred from facts alleged, 85 C 77

in forcible entry and detainer, one must allege actual possession, not that one resides and makes his home there, 85 C 204

in action for recount of vote, there must be an allegation of mistake of count, 85 C 394

complaint for illegal maintenance of street railroad should show ownership of fee of land in plaintiff and legislative authority for such maintenance, 85 C 401

complaint must set forth facts from which fraud is inferred, 85 C 557

in condemnation, allegation of public necessity of taking is not necessary if Legislature has determined it, 86 C 151

action to secure adjudication that building line is null and void; must allege that property owner had no knowledge of proposed public improvement, 86 C 326

to recover damages for trouble and delay because of defendant's failure to disclose name of insurance company, there should be an allegation to that effect, 86 C 551

in suit against insurance agent for failure to disclose names of companies, an allegation should be made that defendant procured insurance for the plaintiff, 86 C 551

bank should plead provisions of its by-laws if it wishes to use them as a defense, 87 C 341

failure to allege demand for redress on the officers of a corporation is not demurrable as no officers were perhaps in existence, and if they were, it would have been useless to make demand, 87 C 656

in action on a city assessment, it must be alleged that notice was given defendant, 88 C 78

—not enough to say that the act was fully complied with, 88 C 78

in libel and slander, the plaintiff may allege that, by way of innuendo, the publication conveyed to readers a defamatory meaning, 89 C 549

§ 8(6) Pleading

in suit for damages for locating telephone poles, one must allege landowner's consent was not given, 90 C 179, 92 C 633

in suit for location of telephone poles one must allege peculiar hardship or injury to get injunction, 90 C 179

in alleging estoppel, must aver that pleader was misled to his injury, 90 C 202

petition for extension of gas mains need not state that company had unreasonably failed to extend service, 91 C 134

to prevent condemnation proceedings, it must be alleged that property is devoted to a public use, 92 C 217

in bastardy, not necessary to allege filing of doctor's certificate that woman was pregnant, 93 C 317

complaint demurrable where title to property is not alleged to be in plaintiff who claims tax exemption, 95 C 50

claim to recover money paid through mistake; *held* essential facts lacking, 97 C 131

general allegation of ownership of property, in action for divorce, sufficient, 98 C 181

sufficiency of complaint by contractor against subcontractor, his bondsman, lienors and owners, where he has had to perform on subcontractor's default, 98 C 803

in action of trespass mere allegation that defendant claims an interest in land and its denial does not permit judgment quieting title under statute, 99 C 123

—necessity of pleading nature and extent of claim, 99 C 122

complaint by trustee to recover property fraudulently conveyed by bankrupt, 99 C 307

—“plain and concise statement” satisfied by what averments, 99 C 307

title is essential allegation to secure injunction against trespasses on real property, 100 C 575

allegation of demand and refusal necessary in accounting action, 100 C 686

allegation of nonpayment not essential in complaint, 100 C 691

in equitable proceeding, not necessary specifically to allege lack of remedy at law where facts show it, 100 C 712

—thus, in action on ground of fraudulent conveyance brought by judgment creditor, sufficient if it appears that by reason of conveyance debtor has no property to pay judgment, 100 C 712

in action of account, no demand and refusal need be pleaded where suit is of equitable nature, 102 C 171

demand and refusal in actions of trover, 102 C 612

if operative facts showing partnership are alleged its existence need not be expressly affirmed, 103 C 437

essential allegations in action of ejectment, 104 C 318

in complaint for equitable relief, plaintiff need not allege that he has no adequate remedy at law, 105 C 80

essential allegations in action for deceit or false representation, 105 C 631

general allegation of irreparable damage must be supported by specification of facts, 106 C 475

element of irreparable injury must appear in complaint for equitable relief to show inadequacy of legal remedy, 107 C 117

sufficient allegations of mistake coupled with fraud though no mutual mistake, 109 C 292

appeal from board of relief for failure to include property of ecclesiastical society in list, 109 C 358

—need not state specifically how plaintiff is aggrieved where this is deducible, 109 C 358

—nor contain specific prayer for relief, 109 C 358

on appeal from administrative board under statute, sufficient if appellant alleges he is aggrieved, 109 C 583

—court may thereafter order reasons of appeal filed, 109 C 583

in appeal from an assessment of damages for street layout, damages to contiguous land must be pleaded, 111 C 27

allegations *held* to fall short of setting up agreement to furnish labor and material on defendant trustee's own credit, 113 C 429

allegations sufficient to support judgment based on liability of party putting out as his own products goods produced by another, 115 C 249

P sought declaratory judgment to determine whether decree of Probate Court that will was void settled conclusively rights of parties and, if not, determination of his rights; *held* demurrer to it should have been overruled, 116 C 201

incumbent upon plaintiff to plead and prove prior incumbrances in proceedings for deficiency judgment in foreclosure, 116 C 329

complaint *held* to sufficiently allege specific acts of defendants conspiring to cheat and defraud plaintiff to his damage to warrant judgment, 116 C 375

demurrer to complaint seeking advice by court as to investments by trustees concerning which they were given discretion in will, properly sustained, 116 C 588

failure to allege facts supporting allegation of irreparable injury pending appeal from refusal of commissioner to grant certificate for retail sale of gasoline, 117 C 260

complaint *held* to sufficiently allege that will was procured by defendants by means of such fraud and undue influence as would

have constituted good defense against its admission, 117 C 565
doubtful if complaint furnished basis for claim of right to certain use of way under original grant, 121 C 63
conversion; replevin; demand and refusal need not be alleged, 121 C 188
allegation that defendant "by reason of acts, wiles, blandishments and misrepresentations" procured execution of deed by plaintiff, while archaic, presented issue of undue influence, 122 C 626
since each tort-feasor may be sued separately, no allegations required in complaint except such as properly set forth liability of defendant sued, 123 C 145
where defendants all in court were apprised of claim and were or should have been prepared to make proper defense, absence of specific allegation that they were partners waived, 124 C 500
lack of intent in good faith to contest will implicit in allegation of lack of consideration, in suit for cancellation of agreement to settle will contest, without specific allegation, 124 C 626
complaint *held* sufficiently inclusive to make inquiry into general conduct of officers of corporation relevant and to support a judgment of receivership, 127 C 32
complaint for injunction restraining defendants from transacting water business did not state cause of action, 127 C 627
in actions for declaratory judgments, 128 C 12
complaint in disbarment proceedings not required to comply with usual technical requirements, 128 C 420
—not necessary to allege all details brought out at the trial, 128 C 420
where complaint contained specific allegations of fraudulent representations in prospectus, these were basis for relief and plaintiff could not rest case on other statements, claiming they were comprehended in more general allegation, 129 C 14

§ 9. —Use of Counts; Joinder of Causes

§ 9(1). In General; Duplicity

no duplicity in declaration for fraud in sale of note, averring protest, 1 R 164
duplicity reached only by special demurrer, 1 R 387, 2 R 146, 9 C 563, 25 C 515, 26 C 224, 28 C 86
—cured by verdict, 28 C 230
—rule the same in civil and criminal cases, 28 C 230
allegation that tort arose from contract is not ill-pleaded, 2 D 418, 531
double pleading of title in trespass before justice is not allowable, 10 C 322

count averring fraudulent transfer of different stocks, *held* not bad for duplicity, 20 C 293
whole count to be construed together, 21 C 572
count covering injury to person and property by defective bridge, *held* not bad for duplicity, 22 C 290
what is required to constitute duplicity, 23 C 134
matters of description and aggravation, or immaterial matter, do not constitute duplicity, 23 C 134
book debt cannot be joined with assumpsit; such defect not waived by appointment of auditor, 31 C 444
—nor by appeal from justice court, 31 C 444
joinder of trespass and case viz., breaking and entering and suing out search warrant, 34 C 391
—averment that both counts are for same cause, *held* decisive, if not repugnant, 34 C 391
claim in one's own right cannot be joined with claim as executor; bad on demurrer; motion in arrest or in error lies, 39 C 523
count setting out eight interest coupons, *held* not bad for duplicity, 41 C 542
statute does not authorize joinder of trespass and assumpsit, 46 C 295
—or joinder of case, trespass and assumpsit, 46 C 295
count alleging various kinds of damage from single act, *held* not bad for duplicity, 47 C 231
Practice Act permits joinder of foreclosure with count to set aside or postpone earlier trust deeds, 49 C 302
Practice Act and rules allow both legal and equitable relief on same facts, 52 C 197, 68 C 204, 80 C 685
—and facts may be presented in a single count, 52 C 197, 68 C 204, 80 C 685
on suit to reform, then foreclose mortgage, facts essential to reformation do not constitute a separate cause of action, 54 C 33
—reformation is but incidental to main object, foreclosure, 54 C 33
plaintiff may sue for entire price in one count where payable in instalments at different dates, 54 C 84
—and prove same by different notes all of which have accrued and are unpaid, 54 C 84
aggregate forfeitures for failure to file certificate of mortgage foreclosure under statute may be alleged in one count, 57 C 52
where complaint shows a complete cause of action, it is immaterial that another cause is disclosed in the same count, 58 C 542, 63 C 551

§ 9(1) Pleading

statute de amending complaint founded on tort to set forth instead cause of action for breach of contract refers not to new count but such an amended statement as makes it a statement of a new cause sounding differently, 63 C 371

“transaction” under Practice Act must consist of what, 63 C 551

—must involve an act or agreement, or acts or agreements, connected with each other, by which the legal relations between the parties affected are altered, 63 C 551

—term applies equally to all grievances whether by violence, neglect, or breach of contract, 63 C 551

—a complaint setting forth breach of contract and a consequent conversion, in a single count, *held* to constitute but a single transaction, 63 C 551

—the two causes were properly united and could be heard together, 63 C 551

—order of court during trial that plaintiff elect under which claim to proceed, *held* error, 63 C 551

“separate and distinct” causes of action are such as are separable by some distinct line of demarcation, 63 C 563

single count to secure conveyance of property bought or recovery of money advanced to purchase it, 68 C 204

misjoinder of causes in one count waived by failure to object, 70 C 320, 71 C 326, 73 C 105, 368, 74 C 304, 106 C 41

one count proper for different causes of action if not separated by distinct line of demarcation, 71 C 376

asking both legal and equitable relief, 72 C 554, 77 C 214, 80 C 685, 83 C 109, 85 C 159

may claim damages for injury already caused by pollution of stream, and injunction against continuance, 72 C 554

several distinct defects in highway may be alleged in one count, as basis for recovery of damages, 72 C 667

transaction and its consequences constituting but one cause of action should be stated in a single count, 73 C 423, 459

—for personal injury and failure to keep contract of employment, 73 C 423

causes for personal injury to plaintiff, and failure of defendant to employ him as agreed, properly joined, 73 C 423

cause of action for fraud in obtaining property, and breach of contract of exchange, 73 C 459, 83 C 109

in action against officer for charging illegal fees, fees charged on several writs may be included in one count, 74 C 241

may combine causes in complaint for loss occasioned by unlawful loans, action under statute forbidding unsecured loans by insurance company and action under statutes

penalizing officers consenting to the loans, 74 C 474

single count sufficient for wrongful dispossession of tenant, destruction of her business and removal or detention of her furniture, 74 C 500

may in same suit obtain judgment for debt and equitable relief to enforce it, 77 C 214

causes of action by creditor against stockholder in dissolved corporation for unpaid balance of subscription, at common law, and under statute, and for refunding of capital wrongfully paid over, properly joined, 78 C 575

that several judgments or separate trials may be necessary, no objection to bringing suit claiming both legal and equitable relief from numerous parties on account of different transactions connected with same subject of action, 78 C 577

misjoinder to be attacked by demurrer alone, 79 C 670

causes of action for retention of money and conversion of bonds may be stated by alleging facts in consecutive paragraphs, 80 C 92

complaint brought to settle title and cancel particular lease; single count sufficient, 80 C 330

complaint in one count founded upon negligence cannot consistently with rules de joinder be construed to set forth cause for fraud or breach of warranty, 82 C 578

action to establish claim against estate for trust fund misappropriated by intestate, and to enforce claim against distributees, properly joined, 83 C 75, 93 C 558

prayer for damages and injunction may be joined in trespass, 85 C 159

allegation of contractual obligation, along with right to compensation, should be allowed to stand, 86 C 561

in action for assault, alleging pain and suffering and death does not set forth two causes of action nor inconsistent grounds of damages, 87 C 301

where it is alleged that one knowingly owned a vicious cat which was permitted to roam at large, only one cause of action is alleged, 89 C 1

damages and equitable relief may be demanded in one count; claim for specific performance of agreement to convey land or to recover money paid if contract is unenforceable, 90 C 285

action by employee for wages earned and for breach of contract by employer may be joined, 90 C 695

only one count necessary where alternative claim made against corporation and its officers, 93 C 479

where liability is claimed to exist by common-law negligence and breach of statutory

duty on part of street railway company, only one count necessary, where common-law and statutory obligations arise out of same facts, 94 C 227

causes of action for money secured by undue influence and for money loaned may be stated in one count, 98 C 201

—so for defect in sidewalk and for defect made more dangerous by ice and snow under charter provision, 98 C 310

joinder of different causes of action in complaint asking for declaratory judgment and consequential relief, 98 C 794, 107 C 117

joinder of causes of action against bailee for conversion and for negligent injury to the property, 99 C 529

plaintiff judgment creditor may seek to set aside fraudulent conveyance and damages for fraud in one action, 100 C 712

negligence and wilful striking are distinct causes, though joined in one complaint, 102 C 676

any number of acts of negligence may be pleaded in one count, 102 C 740

in ejectment demand for equitable relief may be joined to those for damages and possession, 104 C 318

where respective liabilities of sureties on two bonds is uncertain, the causes of action may be joined, 105 C 230

where complaint alleges fraud of corporation in inducing purchase of stock and asks cancellation of contract because corporation never completed steps necessary to issue stock, defect of misjoinder waived if no objection made, 106 C 41

legal and equitable causes, of whatever nature, may be joined and judgment rendered upon any rights of action supported by facts alleged, 107 C 207

—specific performance and breach of contract may be set out in same count, but alternative claims of relief should be made, 107 C 207

breach of contract and conversion may be joined in one count, 107 C 574

may litigate in one action all claims arising out of same transaction or transactions connected with the same subject of action, 110 C 214

upon appeal from assessment by highway commissioner no question of validity of proceedings can be raised; improper joinder, 113 C 651

plaintiff may seek judgment for damages against debtor and setting aside fraudulent conveyances against those receiving them in one action, 114 C 226

complaint setting up action under statute for defective highway and one under common law for nuisance, 115 C 109

contributory negligence is a defense for cause of action based upon violation of statute

forbidding reckless operation of automobile, 116 C 471

—but is not a defense for cause of action based upon reckless misconduct, 116 C 471

—joining action for reckless misconduct in such a case discountenanced, 116 C 471

claim by one indorser to recover amount paid from prior indorser or for contribution on ground of joint liability, properly stated in one complaint, 117 C 24

misjoinder waived by failure to object seasonably and in manner provided by rule, 118 C 162

where nonresident receiver sought declaration of his right to enforce stockholders' liability or appointment of ancillary receiver for that purpose and also judgment against stockholders, joinder of causes of action not improper, 121 C 226

—but that joinder cannot obliterate the necessity of proper procedure as to each cause of action, 121 C 226

while statutes and rules authorize joinder of both legal and equitable matters and claims for relief in same complaint, distinction between equitable and legal causes has not been abolished, 122 C 507

failure to make motion to separate waived claim that each bet constituted separate cause of action, in suit for recovery of money lost in gambling, 125 C 113

party cannot claim as error on appeal misjoinder which he specifically waived at trial, 125 C 737

proper to join action for foreclosure and deficiency judgment and one for claimed fraudulent conveyance in one complaint, 126 C 691

—need not be tried together; where foreclosure decided first there was in effect a separation, though order of court would have been better practice, 126 C 691

—and after foreclosure and deficiency judgment had been granted, plaintiff had right to trial of issue of fraudulent conveyance, 126 C 688

plaintiff had right to set forth entire transaction embracing cause of action on note or for fraud or deceit and to claim recovery upon either ground, 129 C 290

§ 9(2). Use of Several Counts

counts in contract and tort cannot be joined, 2 R 225, 2 D 418

—act of 1875 permitting, *held* limited to cases arising from same cause, 47 C 261

—if clearly for different causes, *held* not healed by averment that they are the same, 47 C 275

—if one count is practically laid out of the case, the misjoinder is harmless, 47 C 275

three separate counts for money lent at different times, *held* good, 3 C 384

§ 9(2) Pleading

count in case for vexatious suit, *held* not to be joined with count on the statute, 11 C 586

distinct count beyond jurisdiction will be stricken out as immaterial, 18 C 73

—aliter, if count is not separable, 18 C 73

each count should contain but one cause of action, 18 C 288

counts for injury to property, and consequential injury to person, *held* a misjoinder unless alleged to be for same cause of action, 19 C 126

joinder of trespass and trover and averment of same cause of action, 24 C 116

—evidence admissible of as many conversions as counts, 24 C 128

—effect of such joinder, 27 C 511

—no misjoinder if trespass is only matter of aggravation, 27 C 511

counts for injury to person and property by negligence cannot be joined, though averred to be for same cause of action, 26 C 220

action on statute; conclusion “by force of said statute” at end of third count applies to all, 39 C 494

different counts stating same cause of action in different modes *held* no misjoinder, 39 C 495

the combining of claims in several counts will not give jurisdiction where the separate counts are not sufficient, 59 C 531

executor asking construction of will cannot join count for distinct cause in which he appears as trustee, the plaintiff being a different person and the causes being separate and distinct, 60 C 399

all the old system sought to accomplish by use of different counts is now accomplished by amendment of material variances and disregard of immaterial ones, 63 C 39

—but the Practice Act does not forbid the use of such counts either expressly or impliedly, 63 C 39

—use of such counts may be important in some cases, 63 C 39

separate count improper for a claimed estoppel to deny authority of agent, 66 C 174

use of unnecessary counts discountenanced, 71 C 245, 717, 72 C 196, 73 C 100, 182, 423, 428, 74 C 304, 498

—where same facts are stated differently to give different legal aspects, 71 C 418

prayer for relief should follow last count, 71 C 251, 425

improper to use two counts where note is given for property sold and one count is based on note and one on sale, 71 C 251

distinct obligations maturing at distinct times should be stated in different counts, 71 C 418

objection waived and two counts treated as one, 73 C 100

on general verdict, court will regard counts as though consolidated, 73 C 368, 74 C 304

each count should be complete in itself and completely answered, 76 C 674

each count for recovery of a sum less than \$1000 but aggregating in excess of that; all can be joined in one count and returned to Court of Common Pleas, 85 C 679

petition to set deed aside and for breach of covenant should be stated in two counts, 91 C 214

—motion to do so can be received before second trial and separate trial ordered, 91 C 214

one count in ejectment, one on wrongful entry on land; verdict on second count setting aside the deed good although no prayer for such relief in second count, because parties went to trial on the merits, 93 C 366

count for setting aside of voidable deed may be joined with one in ejectment, 93 C 368

second count repeated all of first and made an additional claim; *held* defendant not entitled to judgment as long as it is unanswered even if first count is insufficient, 93 C 479

plaintiff may join incomplete common counts with specific count fully setting forth facts showing cause of action, 112 C 64

§ 10. —Common Counts

§ 10(1). In General; Bill of Particulars; Substitute Complaint

object of bill of particulars, and when sufficient, 11 C 301

may be contained in one general count and a pro tanto recovery had thereon, 18 C 221

if bill of particulars applicable to one count only, no limitation of evidence under special counts, 19 C 309

charges not included in bill of particulars may become admissible in equity by nature of defense, 22 C 363

insufficient, on mere contract of indemnity, 25 C 464

office and object of bill of particulars, 28 C 352

memorandum check as bill of particulars under count for money lent, 28 C 352

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§ 10(6) Pleading

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§ 11. —Claims for Relief

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—judgment for debt and equitable relief to enforce it, 77 C 214

when counting on statute, it is better to refer to statute in prayer for relief, 75 C 694, 84 C 47

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under general prayer for equitable relief, decree for reconveyance of property may be granted, 100 C 686

in action to set aside conveyance as fraudulent brought by judgment creditor, under general prayer for equitable relief court may direct application of property to pay debt, 100 C 712

in ejectment, demand for possession and damages may be joined with prayer for equitable relief, 104 C 318

prayer for general equitable relief; extent of relief which may be granted thereunder, 106 C 411

prayer for absolute injunction will support one with condition, 106 C 413

declaratory judgment must be demanded specifically and precisely in prayer for relief, 107 C 117

—may be joined with prayer for affirmative relief, 107 C 117

—on complaint for equitable relief irreparable injury must be alleged directly or by necessary implication, that relief at law may appear inadequate, 107 C 117

claims for relief which are necessarily inconsistent, should be stated in the alternative, 107 C 207

—specific performance of contract or damages for its breach, 107 C 207

—facts may be stated in one count, 107 C 207

appeal from board of relief for failure to include property of ecclesiastical society in list need not contain specific prayer for relief, 109 C 358

plaintiff may state all material facts and demand all relief legally inferable from such facts, whether in contract or tort, 114 C 250

under general prayer for relief in quiet title, plaintiff may have determined interest by equitable lien or otherwise, 114 C 272

plaintiff had no title to property, demurrer to prayer that title to real estate should be quieted in him properly sustained, 116 C 201

construed as seeking relief against admission to probate of will invalid because of fraud and undue influence, 117 C 568

that foreclosure judgment be set aside and plaintiff be given hearing as to amount of indebtedness and that a new law day be fixed, appropriate to attempt to open and modify judgment under the statute, 118 C 226

—remedy precluded in this case, as when action brought title had become absolute in incumbrancer, 118 C 226

where complaint alleged facts appropriate for recovery against either of two defendants, but contained no claim for alternative relief based on alternative construction of cause of action, it was defective, 120 C 140

—but allegations sufficient, after trial without objection, to justify recovery against either defendant, 120 C 140

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§ 12. Demurrer

§ 13. —In General

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court must answer issue of law raised by demurrer to evidence, 1 R 344

—cannot at such stage pass upon the merits, 1 R 344

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§ 13 Pleading

- so before justice after evidence on each side is in, 2 R 62
- waived, by proceeding to try the facts, 9 C 252
- judgment on demurrer in case of misdemeanor *held* final, 19 C 478
- what evidence admissible on hearing in damages after demurrer overruled, 28 C 90
- to petition in equity, after report of committee, is offered too late, 36 C 371
- can only be presented after withdrawal of previous plea, 36 C 371
- treated as standing on general issue, when party fails to formally join in, 39 C 496
- statute de abatement of pleadings does not affect right of special demurrer, 40 C 156
- overruling of demurrer is not a final judgment; pleading over, 48 C 174, 63 C 262, 68 C 504, 71 C 198
- no appeal lies from judgment of justice overruling demurrer, 48 C 368
- party cannot deny and demur to same allegations at the same time, 51 C 433, 61 C 570
- all objection to complaint must be by demurrer, 52 C 190
- under Practice Act everything preliminary in character must be disposed of before trial on merits, 52 C 190
- demurrer to evidence not now used, 66 C 209
- overruled if cause of action may be proved under averments of complaint, consistently with rules governing admission of evidence, 69 C 476
- effect of failure of judgment to specify on what ground sustained, 69 C 485
- demurrer is waived by plea in bar, 74 C 38, 79 C 294
- where demurrer would be unavailing, court may refuse permission for withdrawal of plea in order to file it, 74 C 38
- sustaining of demurrer not a final judgment, 74 C 203
- filing of answer does not waive right to attack ruling on demurrer overruled, on appeal; but facts later found may be regarded, 74 C 689, 87 C 401
- proceedings open after demurrer overruled; effect of default, 75 C 76
- where trial court sustained demurrer to complaint for substantial defects, may refuse to allow amendment which does not obviate them, 76 C 628
- error not to state in writing all grounds of decision on demurrer, 76 C 639
- but no harm done where plaintiff attempted to amend complaint, 76 C 639
- ruling on demurrer, based on invalidity of contract, not conclusive where facts showing its validity are later pleaded, 77 C 507, 83 C 554
- to overrule pro forma demurrer offered on day of trial and going only to formal defects is discretionary, 78 C 276
- if pleading is fatally defective, ruling sustaining demurrer to it should stand, whether reasons which moved court are sound or not, 78 C 575, 82 C 353
- where filing of second waives former one, 78 C 575
- court need not pass on all reasons assigned, 78 C 578
- whole of pleading, certain paragraphs of which are demurred to, is to be read together, 79 C 245
- rule that pleadings should be construed to uphold them, applicable after verdict, not so on demurrer, 79 C 255
- if demurrer to answer presents fundamental question, court, on appeal, will not review ruling on demurrer to complaint, 79 C 470
- on demurrer, writ may be read with complaint, 81 C 286
- court considers entire record and gives judgment accordingly, 81 C 325, 82 C 367
- voluntarily filing amended or substituted answer after demurrer waives right to challenge demurrer, 81 C 415, 474
- where complaint alleges joint negligence, one defendant cannot demur for defective statement as to the other, 81 C 556
- motion to quash in mandamus takes place of a demurrer, 81 C 645, 83 C 554
- appellate court testing sufficiency of demurrer is limited to information of complaint, 82 C 91
- if complaint is insufficient, judgment sustaining demurrer will not be disturbed even if decided on wrong grounds, 82 C 353
- where writing claimed to comply with Statute of Frauds is set out in accordance with court order, on demurrer court may assume that all such writings relied on are set out, 83 C 120
- where demurrer raises same question as finding, decision on demurrer is decisive, 83 C 242, 85 C 50
- trial on the general issue, after a demurrer to second defense is sustained, does not prevent appeal of the ruling on demurrer, 83 C 634
- on appeal, question is as to demurrer's sufficiency, not as to the sufficiency of reasons assigned by trial court, 84 C 275
- demurrer on appeal not considered if same question is presented by finding of facts, 85 C 50
- on a committee report, issue of fact may be joined on a remonstrance or demurrer filed, 85 C 237
- if there are other reasons of appeal than overruling of demurrer, they should appear through subsequent pleading, 85 C 379

amendment that does not avoid an objection raised by demurrer may be denied, 86 C 327

if question is decided after hearing all the evidence, ruling on demurrer is of no importance, 86 C 616

court can consider any facts found in proceeding subsequent to a demurrer in reviewing question of overruling demurrer, 87 C 342

plaintiff cannot question correctness of ruling on demurrer found insufficient where he has replaced it by another to avoid objection, 90 C 261

petition for new trial held insufficient on demurrer may be amended at court's discretion, 91 C 24

immaterial amendment of a complaint does not require refile of a defense already insufficient on demurrer, 92 C 342

irregular to allow a demurrer stricken out to be refiled in form of an application to be heard on legal points, 93 C 374

demurrer may be had by defendant whose interest is adverse to that of codefendant, 93 C 374

voluntarily filing amended or substituted complaint, after demurrer sustained, operates as withdrawal of original complaint and removes ruling on demurrer, 93 C 479

default, after demurrer overruled, admits the cause of action alleged, 94 C 244

where complaint is amended during trial to conform to proof, but not so as to materially change issues, adverse party who waived right to demur to original need not be given opportunity to demur, 96 C 395

ruling on demurrer as law of case, 96 C 494, 568

sustaining on wrong ground immaterial if any ground is correct, 102 C 126, 107 C 117

filing of reply operates as withdrawal of undetermined demurrer, 104 C 291

judgment rendered on general written demurrer merely irregular; upon oral demurrer, is invalid for want of jurisdiction, 104 C 322

trial judge not bound by rulings of another in same case, 105 C 596

action of one judge not binding on another in ruling on later demurrer, 106 C 475

gross defect in failure of complaint to state cause of action cannot be disregarded though parties and trial court regarded general demurrer as though necessary facts to present issue were alleged, 107 C 353

plaintiff has right to adjudication of cause of action upon demurrer or after issue joined; error to deny this right by refusing permission to file substitute complaint after demurrer to original complaint sustained, 108 C 676

overruling of demurrer will not be reviewed where court ruled out cause of action demurred to on trial, 109 C 292

failure to demur does not justify judgment upon issue not within pleadings, 111 C 40

where finding showed that plaintiff gave notice, overruling of demurrer for failure to allege notice becomes academic, 112 C 646

when defendant demurs to petition for new trial, he assumes burden to show court could not grant it in exercise of sound discretion, 114 C 102

correctness of ruling tested by allegations of particular pleading demurred to without regard to subsequent findings on trial, 114 C 544

erroneous ruling on demurrer not ground of reversal where issues thereafter were correctly submitted at trial, 114 C 679

where trial court properly sustained demurrer it is immaterial if it placed its ruling on different ground than Supreme Court, 115 C 301

after amendment to complaint, demurrer to original complaint disappears, and ruling on it not reviewable, 117 C 67

possible error in ruling on demurrer cannot be of avail where necessary facts are proven on trial, 118 C 650

where properly sustainable upon one ground it is immaterial that ruling was placed on a different ground, 119 C 681, 123 C 572

existence of bona fides of mortgage, essential to application of exception in usury statute, could not be assumed from pleadings for purpose of demurrer, 120 C 671

answer waives right to question legal sufficiency of complaint by demurrer, 121 C 77

when nature of defense clearly though generally stated, case tried on issue and jury correctly charged, no good to review overruling of demurrers to defense because of defects in the way pleaded, 123 C 657

though ruling on demurrer unnecessarily went to merits of defense, since it reached correct result it must stand, 124 C 345

where any of various matters set forth in second defense might have been proved as defenses under some phase of case as alleged in complaint, no error in overruling demurrer to it, 124 C 367

where case has been fully tried and decided after demurrer overruled, overruling of the demurrer insufficient ground upon which to sustain appeal, 127 C 544

overruled demurrer to complaint not considered on appeal from judgment where court has all facts before it, 128 C 422

overruling demurrer to complaint no harm to defendant where there is subsequent trial on merits in which same issues involved, 129 C 386

§ 14 Pleading

§ 14. —Form and Construction

general demurrer cannot be amended to special demurrer, 1 R 387
general assignment of duplicity *held* insufficient, 28 C 86
general demurrer is clearly in conflict with Practice Act, 54 C 423
that party is not entitled to relief upon the matters alleged, too general, 64 C 74, 68 C 1
because facts do not constitute cause of action, too general, 66 C 205
because facts pleaded in answer do not constitute a justification, too general, 70 C 306
only reasons specified considered, 70 C 318
cannot introduce new facts, 72 C 572, 81 C 645, 82 C 91
Practice Act does not affect criminal prosecution; demurrer may be general; special one treated as general, 72 C 604, 73 C 18, 90 C 98, 662
demurrer in civil suits must be special, 73 C 538
inartificiality in, disregarded where no objection is made, 73 C 538
allegation that "it appears from the record," etc., does not make record part of demurrer by reference, 74 C 456
in reply, demurrer joined with denial, 75 C 356
demurrer to claim of law as to construction of instrument should attack unsoundness of claim, not impropriety of its insertion, 77 C 508
if addressed to entire answer, but only reaching one or two of several defenses, is properly overruled, 82 C 624
to be overruled if it includes certain, but not all, allegations pertinent to a particular defense, 82 C 634
proper form of demurrer to one of several causes of action stated in one pleading, 85 C 394
sufficiency of paragraphs can be tested only by a demurrer to the whole cause of action or defense, not by a motion to expunge or a demurrer to the several paragraphs, 85 C 394
demurrer must be addressed to each aspect of allegations that are susceptible to double interpretations, or afford two grounds on which to rest claim, if it is to be sufficient, 87 C 370
demurrer addressed to whole complaint is bad if it reaches only one of two causes of action, 92 C 277, 102 C 640
demurrer should not contain allegations of fact, 93 C 194
demurrer should be to several paragraphs which taken together made defense as a unit, 93 C 392
the defect of demurring to several paragraphs severally may be harmless, 93 C 392

where action brought against two defendants and relief sought erroneously against them, alternatively, demurrer should be addressed to prayer for relief, 95 C 310
demurrer, that memorandum of sale does not comply with Statute of Frauds, is too general, 96 C 543
demurrer, of one holding option on interest of cotenant, to complaint for partition, alleging his want of interest, too narrow, as he may have interest in proceeds, 97 C 518
may be addressed to one of several alleged slanderous epithets in a complaint, 99 C 718
may only be used to test sufficiency of entire cause of action, 101 C 163
—may not be addressed to separate paragraphs which do not purport to set forth entire cause, 101 C 163
grounds of demurrer must be special, not general, 107 C 351
demurrer that "no actionable negligence" is alleged and that no liability is "imposed by law upon the defendant" too general, 107 C 351
general demurrers no longer a part of our system of pleading, 108 C 386
addressed to complaint as a whole, should be overruled if any cause of action could be proven under allegations, 117 C 568
where defense pleaded generally to several counts, and demurrer attacks it generally, if it is good as to any one count demurrer should be overruled, 117 C 585
improperly sustained where addressed to remonstrance as a whole, though it contained paragraph which, if addressed to one aspect of remonstrance, would have been sustained, 118 C 350
addressed generally to prayers for relief and not specifically to the one to which plaintiff was not entitled, should have been overruled, 122 C 156

§ 15. —Scope and Effect

never admits the facts as evidence, for any purpose, 10 C 68, 23 C 512, 28 C 69
demurrer to declaration in trespass *quare clausum fregit* does not put title in issue, 14 C 240
demurrer to remonstrance against auditor's report does not admit averments of facts not found by auditor, 17 C 563
lays open the entire pleadings and whole record; judgment goes against party first in fault, 18 C 396, 31 C 120
admits only some cause of action on some of the counts, 23 C 388, 28 C 90
judgment on demurrer is how far evidence in another suit, 23 C 399
admits only facts well pleaded, 23 C 512, 58 C 389

does not conclude party demurring, in another suit, 23 C 512
 only nominal damages are recoverable after demurrer without proof, 28 C 90
 —rule modified in actions on bills, notes, and the like, 28 C 90
 party pleading, admits facts not by demurrer, but by omission to deny, 33 C 237
 after demurrer overruled case is in same condition as after default, 33 C 250
 —effect of, on hearing in damages, 33 C 250
 action for definite penalty; evidence in reduction of damages inadmissible after demurrer overruled, 33 C 253
 admits all elements essential to cause of action, 34 C 377
 on hearing in damages for negligence after demurrer overruled, plaintiff need not prove ordinary care, 34 C 377
 —defendant may show want of ordinary care in plaintiff, 34 C 377
 does not admit allegations not properly in issue, 37 C 165
 reaches nothing which does not appear on record, 45 C 522
 demurrer to plea of officer de facto presents no other issue, 46 C 218
 to plea in abatement does not reach back beyond that plea, 47 C 95
 admits the location of real estate as laid, 51 C 65
 default in tort; admissions of demurrer merely establish defendant's liability to some damages, 53 C 186
 a demurrer admits facts well pleaded only for the purpose of determining their legal sufficiency, 58 C 389, 59 C 403
 —not at all for the purpose of evidence, 58 C 389
 demurrer to a statement of legal effect of resolution, *held* not to admit the correctness of construction, 59 C 65
 claim for services to municipality; demurrer on ground that they were not authorized admits liability, if they were authorized, 64 C 160
 admission by; effect after default, 68 C 345
 doubtful whether demurrer to reply for one cause can ever call for judgment that complaint is insufficient for another cause, 70 C 352
 admits facts well pleaded, 74 C 459, 588, 83 C 140
 does not admit matter of opinion, 74 C 588
 does not admit legal conclusions, 79 C 219, 84 C 280
 —as that railroad "proceeded in no respect under its charter," 76 C 311
 —as, on petition for new trial, that judgment given was erroneous, 76 C 534
 demurrer raising question in part dependent on facts to be proved fails, 80 C 161

—as where addressed to meaning of power of attorney, which is to be read in light of surrounding circumstances, 80 C 206
 —or to construction of will dependent on extraneous evidence, 75 C 285
 does not admit facts shown by record to be untrue, 81 C 325
 demurrer admits facts, not inferences and conclusions, 82 C 585
 demurrer is addressed to the substance and is not proper way to reach argumentative averments in complaint, 83 C 511
 demurrer does not admit powers of corporation and effect of amendment to charter where these are set out, 84 C 280
 failure to raise question of laches by demurrer does not prevent its being raised at the trial, 85 C 84
 allegations in plea in bar that two causes of actions were the same, admitted by demurrer, 85 C 275
 demurrer tests sufficiency of paragraphs which are material parts of cause of action or defense set forth in pleading or count, 85 C 394
 admits facts only to test legal sufficiency of petition, 86 C 351
 demurrer to writ of prohibition that alleged testatrix was a nonresident, *held* to raise the question whether her residence should be tested by the writ or a Court of Probate, 86 C 351
 on demurrer, it cannot be assumed that a policy contained a clause rendering it void on breach of condition, unless it is so alleged, 90 C 203
 ruling on demurrer is law until reversed; same question raised later and decided contrary to ruling will be reviewed if challenged, 90 C 694
 only facts set up in complaint are considered on demurrer, 93 C 160
 demurrer to answer in habeas corpus admits facts of residence and place of commission of offense; its reviewability upon habeas corpus not involved, 93 C 361
 successful demurrer to one count does not justify judgment if complaint contains another count complete in itself, 93 C 479
 demurrer to entire complaint in several counts fails if any are good, 95 C 594
 ruling on, as law of case, 96 C 494
 where demurrer is to certain paragraphs, they must be considered in connection with other paragraphs which with them constitute single justification, 97 C 605
 to remonstrate to committee's report alleging certain ruling admits that ruling was made, 97 C 658
 complaint demurred to and replaced by another drops out of case, 98 C 305, 99 C 67

§ 15 Pleading

—ruling on demurrer has no proper place in appeal, 98 C 305, 99 C 68

limited effect of the admission made by demurrer, 99 C 56

—cannot prejudice demurrant in any other proceeding, 99 C 56

if same issue is presented on trial, ruling on demurrer is immaterial, 99 C 69

does not admit allegations as to legal effect or construction of a contract, 102 C 488

if questions on demurrer later passed on, only later rulings will be considered on appeal, 102 C 488

on demurrer, pleading setting forth written agreement is tested in light of facts alleged, 107 C 40

general demurrer regarded as raising question whether pleading states cause of action where parties and trial court so treated it, 107 C 117

—ruling will be sustained if correct, though on wrong ground, 107 C 117

sustaining demurrer of one codefendant does not establish his freedom from negligence, 107 C 681

admits only facts properly pleaded, 111 C 115

—not those which contradict what before appears certain on the record, 111 C 115

—as those in exhibit annexed to complaint, 111 C 118

pleading demurred to can depend only upon its own allegations and facts not alleged cannot be assumed, 111 C 338

where defense of breach of warranty is out of case on demurrer, evidence in support of it inadmissible, 111 C 565

must stand or fall upon allegations of pleading demurred to; cannot be aided by importing facts not therein alleged, 112 C 198

does not admit legal conclusion pleaded where facts upon which it is based are also pleaded, 112 C 598

pleading tested by facts provable under its allegations, 114 C 559

—as where question is as to meaning to be given words of contract, 114 C 559

is to be tested by allegations of pleading demurred to, which cannot be aided by assumption of any fact not therein alleged, 115 C 631

sufficiency of allegations as against demurrer are to be tested by facts provable under them, 116 C 31

effect of demurrer to petition for new trial for newly discovered evidence, 116 C 649

to special defense admits any facts provable under it, 117 C 586

—if any facts which are provable support the defense, demurrer must fail, 117 C 585

whether allegations, pleaded “by way of counterclaim,” were good defense to com-

plaint, not presented by demurrer to counterclaim, 119 C 603

allegation in answer of existence of intent to evade usury statute must be taken as true, 120 C 671

demurrer admits any facts provable under pleading, 124 C 345

admits facts well pleaded, 127 C 723

one who demurs upon ground that relief should not be granted because of matters going to exercise of discretion of trial court assumes burden of showing that court could not grant relief, 128 C 13

§ 16. —When it Lies

See also § 8 supra

on general demurrer no advantage can be taken of Statute of Frauds, 1 R 78

objection that special plea amounts to general issue, cannot be made on demurrer, 2 D 431, 12 C 366

—court may, however, order the general issue in its place, 2 D 431

general demurrer for want of interest of respondent, is not sustainable when, 7 C 393

—may be sustained as to one respondent and not as to the other, 7 C 394

failure to allege negligence or unskillfulness in building bridge *held* mere matter of form, when, 45 C 550

—and not reached by general demurrer, 45 C 550

allegation of conveyance of real estate without consideration upon understood trust, *held* not demurrable as an allegation of a parol agreement, 53 C 579

—grantee receiving benefit could be compelled to perform, 53 C 579

return to an alternative writ of mandamus is demurrable when, 59 C 86

—where right to refuse obedience to alternative writ can be shown only by incidental facts, a return omitting such facts is bad on demurrer, 59 C 87

misjoinder taken advantage of on demurrer, 67 C 272

lies to misjoinder of parties, 67 C 272

demurrer on ground that contract is oral fails when this does not appear on the face of the pleadings, 68 C 39

demurrer to relief fails where relief sought is adapted to facts alleged and is supported by them, 68 C 39

lies where equitable relief, based on claim which has never been presented against an estate, is sought against the administrator, 68 C 39

where demurrer attacks complaint as radically bad, it fails, if any facts provable under it would support action, 69 C 476, 72 C 262

demurrer to relief fails where any facts provable under complaint would justify it, 71 C 136

if it appears from pleading that action was prematurely brought, demurrer lies, 71 C 473, 72 C 271

omission of averment that plaintiff was actual and bona fide owner of choses in action formal defect to be taken advantage of by demurrer, 71 C 616

demurrer fails, if defect is cured by amendment, 71 C 632

irrelevancy as ground of, 71 C 708

—of paragraphs ground of; but where complaint is sound as a whole, demurrer rarely lies to separate paragraphs as insufficient, 75 C 177

where question material to case may be raised on cross-complaint demurrer to complaint because of omission is not well taken, 72 C 86

demurrer to application for new trial not to be granted where plaintiff under his allegations might be able to prove state of facts entitling him to new trial, 72 C 262
as to taking advantage of Statute of Limitations by, 72 C 687, 77 C 110, 81 C 284, 83 C 503

lies to information based on unconstitutional law, 73 C 18

lies to defense based on oral contract merged in later written instrument, 73 C 38

formal defects in complaint should be attacked by demurrer, 73 C 559

demurrer lies to claim of relief, 76 C 194

demurrer to allegation as one of law where law and fact are both involved, 77 C 508

if, after demurrer to part of complaint should be sustained, sufficient allegations would still remain to support action, demurrer fails, 79 C 241

lies to misjoinder of causes of action, 79 C 670

appropriations of claim for relief in a reply may be tested by demurrer, 79 C 687

that defense is improperly repetitious, cannot be taken advantage of under demurrer going to substance of defense, 80 C 124

lies to statements of law, 80 C 192

where good cause of action is stated, demurrer fails, though some allegations are surplusage, 80 C 551

cannot be based on date alleged as that of personal injury, because it is immaterial, nor on officer's return, because it is no part of pleading, 81 C 284

in complaint against two defendants, specification of negligence of one is no basis of demurrer by the other, 81 C 556

a relief not warranted by complaint is demurrable, 82 C 153

demurrer on basis of one aspect of complaint alone fails if complaint is sufficient on another, 82 C 251

demurrer is proper way to test whether state court should consider a cause created by Congress which state law does not recognize, 82 C 353

irrelevant and evidential matter should be attacked by motion, not demurrer, 82 C 623

recital of facts leading up to agreement relied on, not open to demurrer as statement of distinct cause of action, 82 C 647

complaint is demurrable for failure to set up facts justifying a conclusion of indebtedness, 83 C 76

to prevail on demurrer, party must show that writings are insufficient and cannot be made sufficient under any rules of law, 83 C 120

demurrer is not proper way to take advantage of Statute of Limitations, 83 C 504

demurrer to substance of complaint fails if facts sustaining action are provable under it though the allegations are defective in form, 83 C 511

in appeal from railroad commissioners where other grounds than those alleged exist, or one states merely that he is aggrieved, question of law should be raised by demurrer, 84 C 25

paragraph containing both proper and improper grounds of damage should be attacked by motion, not demurrer, 84 C 111

if an action is brought on contract and a counterclaim founded on tort, demurrer to counterclaim will be sustained, 84 C 437

where pleadings are uncertain, as running "cars having noise-causing defects" by street railway company, demurrer lies, 84 C 450
cross-complaint for mutual mistake in an instrument is not demurrable, 85 C 83

demurrer to prayer for relief because it demands a reconveyance instead of a conveyance, is technical and does not reach substantial rights, 85 C 567

demurrer is not the proper way to raise question of jurisdiction, 85 C 679

where good cause of action is stated, demurrer fails though some allegations are surplusage or evidential, 87 C 70

answer improperly evidential, but a good defense, is not demurrable, 87 C 70

where plea to jurisdiction and in abatement insufficient, demurrer thereto sustained, 87 C 614

demurrer to complaint for winding up corporation not allowed when the facts alleged may, on hearing, justify court in taking action, 87 C 656, 663

where a statute creates right of action and limits it, demurrer lies if complaint does not show compliance therewith, 90 C 527

§ 16 Pleading

complaint that shows who each of the parties is and impossibility of getting them into court, open to demurrer, 91 C 501

demurrer to a defense that Supreme Court said was no defense is properly sustained on retrial, 92 C 342

where complaint attempts to anticipate defense of Statute of Limitations, demurrer lies, 95 C 589

where facts do not appear but are judicially known, defect may be raised by demurrer, 95 C 703

whether contract is too inequitable, because of option to cancel, to be enforceable, is not presented by demurrer, 97 C 703

allegations as to meaning of written contract, not borne out by the writing, are demurrable, 97 C 719

in action on judgment setting out all proceedings, demurrer lies for want of jurisdiction of action, 98 C 251

demurrer lies on ground of Statute of Limitations where essential facts appear on face of complaint, 101 C 666

in action involving construction of will, demurrer to complaint improper, unless all those interested are parties and all relevant, extraneous facts are made to appear, 104 C 97

where contract is alleged to be partly written and partly oral, its sufficiency cannot be tested by demurrer which reaches only the writings, 104 C 645

demurrer to substance of complaint fails if any facts provable under it would support a recovery, 106 C 642

complaint against city for servant's negligence *held* insufficient to raise, on demurrer, question of governmental immunity, 107 C 351

does not lie to answer consisting of admissions, denials and allegations of lack of knowledge, 109 C 48

demurrer proper remedy for nonjoinder of necessary party, 109 C 361

defect of parties proper ground of demurrer, 109 C 361

ignoring defense of bad faith, unreasonableness and abuse of power in condemnation improperly sustained, 109 C 621

demurrer to legal conclusion properly sustained, 109 C 623

—so one to a defense already adjudicated to be bad upon demurrer to complaint, 109 C 623

fails if facts provable under complaint demurred to would constitute good cause of action, 110 C 13

demurrer to defense of usury improperly sustained where record did not show nature of settlement charge in purchase of automobile, 110 C 255

demurrer to failure to allege elements of proof of defense of double liability properly overruled, 111 C 383

demurrer to motion to dismiss or erase appeal, improper, 111 C 663

whether allegations in petition for new trial were sufficient should be tested by demurrer; motion to dismiss should be denied, 112 C 586

where expense of eliminating grade crossing was allocated partly to railroad company, appeal in which latter is not joined is demurrable, 113 C 494

demurrer does not lie to remonstrance to committee's report seeking corrections in finding because remonstrance presents only questions of fact, 114 C 532

—if facts found without evidence or an undisputed or admitted fact is not found, this is error in law, 114 C 532

—if corrections sought are clearly irrelevant or immaterial, demurrer lies, 114 C 532

—but should not be sustained unless this clearly appears, 114 C 532

question of Statute of Frauds may be raised on demurrer when it appears that it will be impossible to offer evidence of the necessary memorandum, 114 C 539

demurrer to information under Motor Vehicle Junk Yard Act should have been sustained on constitutional grounds, 116 C 458

when petition sets up newly discovered evidence in detail and annexes the evidence given at the former trial, defendant may demur to petition, 116 C 697

—but he need not do so and upon hearing may, without pleading, raise question of dismissal of petition, 116 C 697

pleading, defective in alleging conclusion without facts to support it, is demurrable, 117 C 97

—so defense that plaintiff assumed risk of entering automobile without supporting facts, 117 C 97

where allegations of legal conclusions constitute attempt to set up separate cause of action or defense they are demurrable, 117 C 230

demurrer to complaint setting forth usurious loan but alleging it was intent of payee to receive only legal rate, should have been overruled, 118 C 1

though complaint alleges demurrable conclusion, it is not demurrable if subordinate facts alleged do not support this conclusion, 118 C 644

—allegation of "mutual benefit" in negligence action did not bring complaint within guest statute where subordinate facts did not support it, 118 C 644

failure to allege fact of insufficiency of assets of New York bank in action to recover assessment against stockholders here made complaint demurrable, 119 C 83

party obtaining oyer may demur to adversary pleading as insufficient on its face, 119 C 416

failure to negative compliance with legal requirements for appropriations and issuance of sewer bonds not ground of demurrer, 123 C 573

governmental immunity properly pleaded since plaintiffs indicated they claimed to recover on basis of negligence, 124 C 341

—and as it could not be said as matter of law that any damage sustained was not caused by acts of God, demurrer addressed to this portion of defense also properly overruled, 124 C 341

plaintiff might be able under complaint to prove that usurious note and mortgage were given as security and that loan sued on was distinct from it; demurrer should have been overruled, 124 C 485

where copy of note not incorporated in complaint but filed on defendant's motion for oyer, this made it part of pleadings and laid basis for demurrer that terms of note violated usury statute, 124 C 486

plaintiff can prove estoppel in pais against defendant's taking advantage of Statute of Frauds without pleading it, 124 C 507

—whether or not all essential elements of estoppel were set forth therefore immaterial and demurrer properly overruled, 124 C 507

plaintiff injured by fall in beauty shop of defendant's lessee caused by structural defect; demurrer should have been overruled, 125 C 516

—though had ground of demurrer been that complaint was based on nuisance rather than negligence, it might have been sustained, 125 C 516

where basis of complaint was that lease terminated by lapse of time, demurrer to defenses that no certificate of occupancy was procured and there was partial eviction, properly sustained, 125 C 543

when demurrer lies in action for declaratory judgment, 128 C 12

demurrer on ground that an action is prematurely brought lies only when that appears on face of complaint, 128 C 13

where plaintiff in appeal alleged only that commission had revoked his restaurant beer permit, complaint was demurrable, as he must allege grounds upon which he is entitled to relief, 129 C 642

§ 17. Answer

See also § 4 *supra*

§ 18. —In General; Form

inducement to material traverse is not traversable, 3 D 231

—issue on traverse does not admit truth of inducement, 3 D 231

in tort, on joint plea of not guilty, one defendant may be found guilty and the other not guilty, 9 C 367

plea of payment by set-off and also in goods, *held* not bad for duplicity, 17 C 40

a denial of facts averred waives, for the time, the legal sufficiency of declaration, 32 C 160

court has no discretion to refuse proper plea, 49 C 247

party not in contempt for failing to file general issue as ordered, if court permits demurrer, 49 C 247

party cannot deny and demur to same allegation at same time, 51 C 433, 61 C 570

a plea in bar is one that undertakes to be a conclusive answer to the entire cause of action, 60 C 237

—therefore it must traverse, or confess and avoid complaint, 60 C 237

—averments *held* not to destroy prima facie legal effect of fact stated in complaint, 60 C 237

a defense to a complaint is presumed applicable to the relation of the parties as set up in the complaint; unless defense states other relation, 62 C 428

of answer under Practice Act in general, 67 C 377

effect of denials in answer, 69 C 6

answer admitting all allegations of complaint not regarded as demurrer; waives formal defects, 70 C 68

denial of allegations as precluding objection to evidence under them, 70 C 304, 454

where two distinct defenses in answer, one admissions and denials and the other of an alleged justification, *quaere* whether they should not have been alleged in a single defense, 70 C 305

under denial, legal sufficiency of pleading not in issue, 71 C 30

so much of answer as seeks to get in new parties or obtain affirmative relief to be disregarded, 71 C 50

unnecessary separation into counts discountenanced, 71 C 708, 72 C 196, 73 C 513, 74 C 699, 78 C 100

—certain matter was pleaded as second defense; *held* that it should be joined to rest of answer, 71 C 170

—admissions, denials, and special defenses should be pleaded together; error waived if not objected to, 70 C 320

—denials and matters of avoidance properly joined in one answer, 75 C 350

allegation of lack of knowledge, etc., equivalent to a denial, 72 C 391, 73 C 448

§ 18 Pleading

an answer which merely repeats allegations of an overruled demurrer will be stricken out, 72 C 481

plea in bar withdraws demurrer, 74 C 38

answer cannot be treated as equivalent to a stipulation for a transfer of cause, 74 C 90

answer judged insufficient on demurrer and replaced drops out of case, 74 C 125

should not deny paragraph as a whole unless pleader expects to contest it all; procedure where this is done in connection with special denial; denial of all facts not specifically admitted, 74 C 699

claim for relief can only be denied by denying allegations of complaint, 76 C 194

each count of answer, and answer to each count of complaint, should be complete, 76 C 674

facts admissible under denial may be pleaded as second defense when, 78 C 276

filing of general denial while demurrer to complaint is pending, operates as a waiver of the demurrer, 79 C 294

State, seeking equity, is subject to defense or cross-complaint, 81 C 9

contract may be pleaded in defense in general terms, if plaintiff is fairly apprised of its nature, 81 C 479

striking out a "second defense" *held* harmless where entire matter could be litigated on complaint and answer, 81 C 707

pendency of prior action cannot be set up in answer, 82 C 2

upon denial of allegation that conveyance was in fraud of plaintiff, a creditor, proof is on the plaintiff, 83 C 109

denial of several material facts raises separate issues, 83 C 109

denial of allegation in complaint alleging negligence in location of boundary line, puts burden of showing that it was wrongly located on plaintiff, 85 C 337

argumentative denial in answer does not shift burden of proof, but is vicious pleading, 85 C 338

—to set up defendant's version of a contract as different from one sued on, would be argumentative, 85 C 342

A, not pleading his contract with B as a defense, cannot claim it on appeal, 87 C 158

answer not responsive is stricken out, 88 C 94

answer not replied to taken as true, 89 C 229

repetition of the main question as a legal conclusion in a separate defense can be stricken out, 89 C 672

expunging portion of defense is harmless if it does not narrow issue of such defense, 89 C 672

a restraining order may issue if appropriate to answer and counterclaim and covered by prayers for relief even if matter was not mentioned in complaint, 90 C 108

if one answers to merits on penalty of being defaulted, he does not act voluntarily and can contest jurisdiction later, 90 C 293

corporation cannot plead its own acts as *ultra vires* to obtain an unconscionable advantage, 91 C 537

immaterial amendment of a complaint does not require refile of a defense already insufficient on demurrer, 92 C 342

that suit was prematurely brought must be raised by plea, not by answer, 92 C 380

if amount in demand does not appear in complaint, it may appear in answer, 95 C 66

allegations in answer that trustees approved sale, but not by formal vote, is material, 95 C 399

payments apply only to the counts to which they are pleaded, 98 C 656

penalties for denying allegations without reasonable cause, 99 C 164

—denial does not invalidate judgment on the pleadings and facts found, 99 C 164

answer to complaint to quiet title waives right to contest remedy as appropriate, 109 C 310

legal conclusions in answer improper, 109 C 623

pleading of double liability need not contain elements of proof by which it will be sustained, 111 C 383

pleading merely stating that mortgage is invalid, without alleging facts, raises no issue, 112 C 450

when defendant answers essential facts omitted in complaint he supplies defects therein and submits issues to court, 114 C 349

where defendant voluntarily alleges a fact provable under general denial he invites charge of court that he has assumed affirmative on that issue, 114 C 662

a defendant who alleges facts which could have been proved under general denial assumes burden of proof thereof, 115 C 658

—as where defendant in negligence action affirmatively alleged contributory negligence, 115 C 658

in action by injured party on liability insurance policy to recover from insurer amount of judgment secured against D, insurer cannot take inconsistent positions that D was not operating car and that he breached provision of policy by stating to it that he was not, 118 C 190

filing answer waives right to question legal sufficiency of complaint by demurrer, 121 C 77

does not raise issue of demand and refusal in action of conversion or replevin, 121 C 188

mandamus under old age assistance, 125 C 160

§ 19. —Sufficiency

answer in equity denying truth and sufficiency of bill, *held* allowable, 39 C 401

defense for taking a stream, that the use was reasonable, proper, and consistent with plaintiff's rights, *held* demurrable as a conclusion of law, 62 C 232

—or of law and facts so blended that they could not be separated, 62 C 232

to put in issue lawful possession of goods by plaintiff from whom they were taken, this should be denied; mere attack on his title not sufficient, 68 C 384

to action for pollution of stream by sewage, answer that plaintiff's use of it was reasonable, insufficient, 69 C 668

allegations constituting even a partial defense not immaterial or irrelevant, 73 C 513

answer denying material allegations not demurrable as a whole, 77 C 559

an answer after demurrer overruled merely setting up special laws is insufficient, 78 C 1
statement of claim of title and specification of its source; former is not, latter may be, issuable, 78 C 129

in action by tenant against landlord for expenditures for water rent, allegations as to custom that tenant pay it *held* sufficient, 79 C 588

allegation as to agreement to furnish goods, without stating any agreement to accept them, sufficient, if not demurred to and evidence not objected to, 81 C 479

to a suit to recover money wrongfully paid to consignor by railroad for goods supposed to be lost, bankruptcy of consignee in whose hands they were found *held* to be no defense, 83 C 462

can plead receipt in full as bar as to entire debt although there was payment of only a part, 85 C 679

defendant in summary process must show a tenancy created by law, not possession under a void lease, 86 C 32

answer improperly evidential but a good defense, is not demurrable, 87 C 70, 72

at common law a plea of tender is no defense unless paid into court, 87 C 158

plea of tender unaccompanied by payment authorizes a plaintiff's judgment, 87 C 158

—if made sole defense, defendant is entitled to costs if recovery does not exceed tender, 87 C 158

suit to recover machinery sold on conditional sale; defense attacked validity of service; *held* that plaintiff could show even if service invalid that he had title to property and on condition broken could recover it through act of the officer, 87 C 369

rule that one must specifically controvert execution and delivery of a written instrument does not apply in action of conversion where written instrument is not relied upon, 91 C 272

to plead invalidity of a contract not to engage in business for three years in a given town, one must set up facts and circumstances, 92 C 641

allegation that broker's services were of no value *held* immaterial when the question was whether the agent was faithful to his principal, 95 C 273

demurrer to defense of contributory negligence in action brought under guest statute properly sustained, 117 C 97

where contractor assigned money due under contract with town, latter must allege and prove that there were other claims against the fund of equal or greater priority, 120 C 274

§ 20. —General Denial; Notice under General Issue

duress may be shown under general issue, K 237, 2 R 123

in debt on bond, matter in avoidance is admissible under general issue, K 237

performance or prevention by plaintiff inadmissible under plea of non assumpsit in action on express promise, 2 R 495

usury admissible under general issue prior to statute de notice, 3 D 74

executor need not produce letters testamentary when, 3 D 303

count charging two distinct causes of action; defendant cannot object to proof of both, under general denial, 5 D 269

—his remedy is by motion in arrest, 5 D 270

must deny express as well as implied promise alleged, 1 C 152

usury in simple contract admissible under general denial in ejectment by mortgagee, 4 C 437

—if notice of usury is required, facts must be stated, 4 C 437

defense showing there was never any right of action, may be proved under general issue, 5 C 335

discharge by third person inadmissible under general issue, without notice, 25 C 410

notice in former suit is not available in another trial, 30 C 486

the notice is no part of the pleadings, 30 C 488

alteration of writing may be shown under general denial, 31 C 178

—simply waives proof of signature to writing, 31 C 179

nothing admissible under notice not tending to prove the issue under which it was offered, 31 C 292

fraud inadmissible under general issue without notice, 32 C 21

—contra, 2 R 123

the notice puts nothing in issue, 34 C 56, 44 C 424

§ 20 Pleading

- counts for personal assault and assault by dog; notice of justification *held* to apply to both counts, 35 C 28
- construction of notice *held* to show a reliance on set-off only, 35 C 592
- history of requirement of notice under a general denial, 38 C 47
- statute de notice *held* remedial, and to be liberally construed, 38 C 49
- notice must state ground and substance of defense, 38 C 49
- notice need not state matters of mere form, 38 C 49
- plaintiff may request court to order more specific notice, 38 C 49
- notice has all the force of a special plea, 39 C 465
 - notice of payment after service of writ admissible under general issue, 39 C 462
- fraud cannot be proved unless averred in notice, 41 C 567
- coverture is not provable under general issue without notice, 45 C 299
- defense that claim was not presented against estate of intestate in time, inadmissible under general issue without notice, 48 C 376
- plea in bar alleging new matter but in effect denying declaration, *held* practically general issue in action under statute, 49 C 245
 - plea *held* to be good and not in effect the general issue, 49 C 246
- party not in contempt for failing to file general issue as ordered, if court permits a demurrer, 49 C 247
- cannot claim nuisance under general issue without notice, 50 C 213
- general denial under the Practice Act is identical in its scope and effect with the general issue under the old practice, 52 C 254
- trespass quare clausum fregit with allegations of ownership; general issue does not put title directly in issue, 52 C 254, 257
- circumstances attending utterance of slanderous words are admissible under general denial, 54 C 434
 - no error for court to expunge statement of such circumstances in a second defense, 54 C 434
- rules de proof under special and general denial, applied, 57 C 523
- general denial and plea of tender repugnant, 67 C 74
- general denial only permissible when intended in good faith to controvert all allegations of complaint, 67 C 377
- substitution of special answer for general denial withdraws latter, 67 C 377
- general issue, non assumpsit, nil debet, at common law, 70 C 157
- general denial of libel admits proof of privilege, 72 C 335
- on general denial in action for goods sold, defendant may show that he was plaintiff's agent, 74 C 614
- it is improper to join general denial to plea of justification where latter is only real defense, 75 C 350
- effect of general denial of actual bona fide ownership of claim under assignment executed and delivered, 75 C 675
- general denial waives right to more specific statement, 80 C 335
- under general denial of allegation of title and possession, it can be shown that plaintiff's grantor was ousted of possession when deed was made, 84 C 569
- in trespass, under general denial one may prove or deny title and right of possession in the party under whose authority he acted, 85 C 203
- under general denial, defendant can prove facts inconsistent with truth of plaintiff's averments, 85 C 342, 86 C 292, 88 C 643, 90 C 5
 - proof that property was conveyed as a gift rebuts its conveyance in trust, 90 C 5
- in trespass under a general denial, wrongful entry and not title to land is gist of the action, 86 C 537
- under general denial, fraudulent surrender of lease not in issue, 87 C 129
- in ejectment, under general denial, can prove money spent on property in good faith, 88 C 515
- in suit to foreclose judgment lien, under general denial anything can be shown that proves defendant had no interest in land, 90 C 555
- in trover, where complaint alleges ownership and deed is offered to prove it, lack of authority to execute it may be proved under a general denial, 91 C 272
- in slander action, privilege may be shown under general denial, 97 C 38
- if all facts relied on can be proved under general denial, additional pleading is unnecessary, 97 C 719
- general denial permits proof of any facts disproving allegations of complaint, 99 C 164
 - in action for fraudulent representations, permits proof of truth of statements or honest belief in them, 99 C 164
 - oral surrender of apparent lease may be shown to support representation that title was unencumbered, 99 C 164
 - but in action of breach of contract or specific performance this would have been matter of avoidance, to be specially pleaded, 99 C 164
- that receipt and agreement alleged in complaint were written on sheet of paper blank except for defendant's signature, secured by fraud, admissible under general denial, 104 C 338

effect of general denial of allegation in complaint on insurance policy that all conditions have been fulfilled, 108 C 164

—answer not proposing to contest all must plead specially those it intends to controvert, 108 C 164

in action on award, defense that in addition to writing, arbitrators had agreed that plaintiff should not go into competing business *held* admissible under general denial, 108 C 478

in action by broker to recover his commission, neither fraud, mistake nor waiver of provision of written contract can be proved under general denial, 108 C 534

effect of general denial of complaint on insurance policy alleging full compliance with all conditions, 108 C 563

defense of governmental immunity supported by general denial if no objection raised at trial, 108 C 622

one giving order for goods may, under general denial, prove cancellation before acceptance, 114 C 14

defendant may give evidence that agreement was different from that stated in complaint without setting it up in his answer, 116 C 593

Statute of Frauds may be taken advantage of under general denial, without special pleading, 121 C 397

insurance; plaintiff must plead that death was by accidental means and as suicide would directly negative this, proof of it may be given under general denial, 124 C 532

while failure to confine denial to fact that death was not due to accidental means might subject defendant to penalty, it was not precluded from proving suicide, 124 C 533

where it is inherent in very claim of plaintiff that amount he seeks to recover is something which is presently owing him, defendant need not plead payment as special defense, 125 C 197

—fact of nonpayment put in issue on general denial, 125 C 204

plea of general denial and lack of consideration for note do not constitute fatally inconsistent defenses, 125 C 728

§ 21. —Special Pleading

§ 21(1). In General

must conclude with verification if new matter is pleaded, where traverse goes to part of allegations only, 1 R 243

subsequent matter of defense must be pleaded specially, 5 C 335, 19 C 532

—otherwise only nominal damages are recoverable, 19 C 533

plea insufficient as to one of defendants joining in, is bad as to both; applies only to plea in justification, 9 C 367

plea must answer the whole declaration; failure, due to nature of defense, is not aided by repleader, 30 C 136

effect of plea failing to fully meet the charge, 30 C 518

special traverse must give pleader a good right on its face, 32 C 348

incidental facts varying a certain legal result from the facts per se, is new matter, 59 C 86

—must be specially pleaded and is not put in issue by denial, 59 C 87

an affirmative defense should always be pleaded, 62 C 232

special defense presenting same issue as a general denial may be stricken out on motion, 88 C 73

if defendant alleges affirmatively what he could prove under general denial, he has the burden of proving it, 88 C 114

unnecessarily pleading a “special defense,” defendant must prove the same, 97 C 509

matters in avoidance or consistent with truth of complaint must be specially pleaded, 104 C 340

defense which should be specially pleaded cannot be supplied by cross-complaint, 107 C 491

—agreement for settlement of case, 107 C 491

any facts claimed to establish illegality of recovery by plaintiff must be affirmatively pleaded in answer, 128 C 260

§ 21(2). Contracts; Insurance Policies; Payment

plea of tender “being full sum due,” *held* sufficient, though such sum was less than face of note with interest, 5 D 316

plea of release; omission to aver compliance with proviso, *held* fatal, 5 D 489

plea of tender must aver that articles were set apart and designated, 7 C 110

plea not vitiated by reference to receipt as a release, 13 C 142

party pleading performance assumes onus; sufficiency of pleadings is not thereby put in issue, 20 C 85

defense, that an insurance policy is conditional, must be specially alleged, 59 C 41
receipt, to operate as discharge or accord and satisfaction, must be specially pleaded, 67 C 35

accord and satisfaction, 76 C 194

express contract as defense to complaint for reasonable worth of services to be specially pleaded, 80 C 206

payment must be pleaded unless inferred as a legal conclusion, 81 C 711, 88 C 73

§ 21(2) Pleading

nontender of an article after time agreed upon should be pleaded, 83 C 520
either party may allege and prove the illegal character of a contract entered into by them, 85 C 283
defendant must plead specially that a resale of goods rescinded the sale to the defendant; also that some wrongful act was committed, 86 C 22
provision of contract, that work was to be completed to satisfaction of owner and that he was dissatisfied, must be alleged in answer to be a defense, 88 C 619
in sales, admitting the contract but alleging the goods defective and not as represented, is an affirmative defense, 89 C 336
in suit for commission, answer alleging agreement to accept a particular sum is one of confession and avoidance, 92 C 257
answer should allege release from an indebtedness if it is relied on, 95 C 587
want of consideration to be specially pleaded, 95 C 703
that contract sued on was with a corporation of which defendants were agents, and not with defendants individually, should be specially pleaded, 96 C 465
in action for breach of contract or specific performance, oral surrender of apparent lease would be matter of avoidance, to be specially pleaded, 99 C 164
decline in value of article bought by infant and returned upon rescission to be specially pleaded, 99 C 266
quaere whether infancy need be specially pleaded in action on note with general denial, 99 C 267
payment must be specially pleaded, 100 C 698
defendant to deny specially in answer execution of lease, 102 C 478
absence of consideration for negotiable instrument must be alleged and proved, 102 C 620
defense that contract rescinded, must be specially pleaded, 102 C 627
illegality of contract must be specially pleaded, unless apparent on face of contract and all circumstances are before the court, 103 C 387
violations of lessee's covenants when urged as defense to suit for renewal of lease, should be specially pleaded, 107 C 459
answer should specially plead conditions of insurance policy which it is intended to claim were not fulfilled, 108 C 164
accord and satisfaction should be specially pleaded, but where parties tried case as though it were, defect is waived, 108 C 471
defendant could not avail himself of any breach of warranty in sale to him where

such breach not alleged in answer, 117 C 457
defendant insurer must allege any breach of conditions of policy it intends to rely on, 118 C 190
if insurer intended to claim that loss was within provision excluding damage by fire, it should have specially pleaded to that effect, 120 C 296
—not having done so, and claim being made at trial that it was thereby precluded, effect of clause not considered on appeal, 120 C 296
in absence of special plea, cannot claim novation, 120 C 622
policy provision requiring notice and additional premium for structural repairs should have been pleaded and treated as proviso, not as condition breach of which would void policy, 122 C 202
where nonpayment is not alleged, payment must be specially pleaded and proved by defendant, 125 C 203
though nonpayment is alleged in most cases it is necessary for defendant to plead payment to have advantage of it, 125 C 204
defense that contract is ultra vires is in nature of confession and avoidance and must be specially pleaded, 125 C 358
in suit for real-estate broker's commission, defense that principal withdrew offer is matter in avoidance and should be specially pleaded, 126 C 162
in action for materials and services furnished, defendants not entitled to prove as special defense, even pro tanto, damages suffered from plaintiff's partial breach of contract; items belonged in counterclaim, 126 C 554
—but they would be entitled to show any circumstances which would reduce reasonable value of material and labor furnished, 126 C 554
where alteration is not apparent on face of note it must be specially pleaded, 128 C 248

§ 21(3). Negligence; Assumption of Risk

a special defense to a complaint for negligence which merely avers facts showing due care, but which do not constitute a justification, *held* insufficient, 63 C 495
negligence of plaintiff seeking to recover money paid by mistake to be pleaded specially, 83 C 462
assumption of extraordinary risk as a defense must be pleaded, 87 C 149, 88 C 17, 22
must plead last clear chance doctrine to rely on it, 95 C 431
defense of assumption of risk is in nature of plea in confession and avoidance; must be specially pleaded, 116 C 18

incumbent on defendants, in death case, to plead and prove contributory negligence of decedent under statute, 116 C 150
 assumption of risk must be specially pleaded; this being rule of procedure it applies despite fact that accident happened in Massachusetts, 116 C 545
 special defense that hospital, by charter, was charitable corporation without capital stock, whose members could derive no profit, alleged sufficient facts to show it a charitable institution, 117 C 586
 claim that plaintiff, by voluntarily entering firehouse and climbing on truck, assumed risks involved, cannot be considered where not pleaded as defense, 118 C 312
 where plaintiff alleged that deceased was in exercise of due care and defendant did not affirmatively plead contributory negligence, charge that burden of proof on issue was upon plaintiff sustained, 118 C 471
 assumption of risk must be specially pleaded, 119 C 230, 120 C 336
 effect of 1931 statute concerning pleading and burden of proof of contributory negligence in actions where injured party has died, discussed and cases reviewed, 119 C 339
 affirmative defense, in nature of alternative pleading, not so inconsistent with denials in answer as to be improper, 128 C 283
 —not an admission of negligence, 128 C 283
 answer alleging that plaintiffs were contributorily negligent in not following custom of men doing like work as regards taking precautions sustained, 129 C 606

§ 21(4). Miscellaneous Cases

plea of usury must set out principal and interest, K 143
 defendant should plead specially refusal of information, K 188
 plea of prior suit must aver that it was brought before the present action, 1 C 323
 plea of right of way, in trespass, admits possession of plaintiff, but not absolute title in him or his grantors, 10 C 23
 application by insurance commissioner for receiver; it is no answer that another company had assumed its liabilities, if policyholders had not consented, 45 C 377
 the truth, as a defense to libel, must be specially pleaded; either as a justification, or in mitigation of damages, 53 C 43
 —a long-established rule; Practice Act does not change it, 53 C 43
 averment in answer of agreement varying note for annuity not taken on demurrer to be an agreement in writing, 58 C 439
 defense to killing dog, first, that dog was doing mischief, second, that dog was a stray running at large, *held* defective, neither being a good defense alone, 61 C 1

facts constituting fraud should be so stated that the court can see that they do so, 61 C 271
 justification under act of Legislature inadmissible under general denial, 62 C 241
 that action was prematurely brought, how pleaded, 70 C 157
 if Statute of Limitations is not pleaded, it cannot be availed of, to secure nonsuit, though plaintiff's own evidence shows it to be a bar to claim, 71 C 30
 duress should be pleaded, 71 C 188
 statutory requirement as to denial of execution and delivery of written instrument, 73 C 662, 740, 74 C 224
 facts showing illegality not apparent on the face of the complaint must be pleaded, 77 C 508, 85 C 635
 fraud as a defense should be specially pleaded, 81 C 252, 83 C 107, 85 C 579
 where there have been representations of fact not opinion, fraud and invalidity can be pleaded, 82 C 623
 ultra vires as a defense by a corporation must be pleaded, 85 C 147
 laches should be pleaded, 85 C 557
 denial of right to sue as trustee must be specially pleaded, 86 C 402
 bank must plead by-law if it relies on it, 87 C 341
 Statute of Limitations may be taken advantage of on trial even if not pleaded where no ground or reason for such plea is there disclosed, 88 C 537
 that a note was obtained by fraud or conspiracy must be alleged if it is a defense, 89 C 128
 forfeiture as a defense should be pleaded, 90 C 560
 defendant intending to rely on *lis pendens* statute relating to priority of incumbrances must plead it, 91 C 165
 must plead release of principal on a bond, or misjoinder or nonjoinder of parties, if relied upon, 91 C 343
 special pleading necessary if identity of plaintiff is to be attacked; suit against A doing business as the A & N Magazine, 94 C 79
 waiver must be pleaded, 94 C 495
 failure of negotiable instrument to have stamp must be specially pleaded as a defense, 95 C 562
 Statute of Limitations to be pleaded by answer, 95 C 589
 fraud in surrender of lease to be specially pleaded, 97 C 129
 failure to present claim against estate within time limited by statute, 98 C 201
 —if relied on as a defense, failure must be pleaded in bar, 98 C 201
 special plea is required to raise issue of duress, 98 C 571

§ 21(4) Pleading

defense that arbitration proceedings under contract provision had failed because of plaintiff's bad faith must be pleaded, 98 C 617

if real owner of land would rely on his title in defense of action of trespass for forceable entry he must plead it, 99 C 127

where in action against municipal corporation acts relied on are not alleged to be done by agents, defense of lack of authority in its agents need not be specially pleaded, 99 C 702

in mortgage foreclosure, question as to validity of mortgage must be raised by pleadings, 100 C 301

—not available on hearing in default, 100 C 301

defense that deed procured through fraud must be specially pleaded, 101 C 186

—evidence inadmissible under a general denial, 101 C 186

estoppel in pais may be proved though not pleaded, 101 C 586

where surety on attachment bond subrogated to principal's rights has claim against makers of note they can set off note held by them against principal, 101 C 736

—setting up note in defense *held* effectual as a pleading of set-off though words "by way of set-off" omitted, 101 C 739

in suit by beneficiary to set aside trust, failure of plaintiff to demand institution of action by trustee must be specially pleaded, 102 C 98

carrier must plead and prove excuse for misdelivery of goods, 102 C 461

in action to recover compensation illegally paid to town officer, defense of "long usage" must be specially pleaded, 103 C 418

that mortgagee misconducted sale under Massachusetts mortgage must be specially pleaded, 103 C 503

—and that he failed to apply proceeds on note, 103 C 503

that defendant's signature to receipt and agreement procured by fraud must be specially pleaded under statute requiring specific denial where execution or delivery of written instrument controverted, 104 C 338

agreement for settlement of case must be specially pleaded, 107 C 491

on appeal from assessment of benefits and damages, where land taken not described, city may show portion within layout had been dedicated to public use without special plea, 108 C 205

equitable defense may be pleaded to action on an award of arbitrators, 108 C 478

waiver must be specially pleaded, 108 C 537

defense that judgment was void because of fraud of attorney must be pleaded as affirmative defense, 113 C 539

in slander, plea of justification must be as broad as the charge complained of; it must justify the very charge and it is not sufficient to allege a different statement though of same general nature, 117 C 599

—complaint charged defendant saying plaintiff's son was illegitimate; answer that defendant said plaintiff had to get married and that this was true, *held* not to raise issue of justification, 117 C 599

fraudulent purpose of transfer of property must be specially pleaded in suit by transferor against transferee for return of property, 118 C 489

judgment that mortgage given by client to attorney was invalid should have been pleaded by way of estoppel in action for value of latter's services, 119 C 253

waiver by tenant of landlord's agreement to repair requires special plea, 119 C 415

illegality not apparent on face of pleadings must be specially pleaded, 120 C 190

—as chattel mortgage to secure loan under Small Loans Act, 120 C 193

divorce; condonation of offense should be pleaded as affirmative defense, burden resting on defendant to prove it, 123 C 409

conversion; not necessary for defendant to plead that bowling alleys were part of realty as special defense, 124 C 60

where water company alleged that it deemed it necessary to take certain land, that decision was unreasonable or made in bad faith or in abuse of power, of no avail in absence of special pleading, 124 C 438

waiver as defense must be specially pleaded, 129 C 682

—allegation that mortgagee was willing to approve plans and specifications not allegation of waiver by it of requirement in lease that it sign them before lease should be effective, 129 C 682

§ 22. —Counterclaim; Cross-Complaint; Set-Off

See also SET-OFF, RECOUPMENT AND COUNTERCLAIM

Statute of Limitations a good replication to plea of set-off, 9 C 364

claim in set-off need not be proved as alleged, 17 C 39

set-off must be claimed by plea or notice, 28 C 120

plea of set-off does not affect plaintiff's right to withdraw or become nonsuited, 43 C 62

defendant pleading set-off is virtually plaintiff as respects that claim, 49 C 92

Practice Act did not intend to give wider range than allowed by settled chancery practice, 50 C 46, 53 C 35

—left set-off and recoupment as they stood before act was passed, 50 C 46

averment of warranty that machine was in good working order, *held* to mean good order for vendee's use, 56 C 489

—hence subsequent averment that machine was wholly useless for purpose required, *held* sufficient for recoupment on breach, 56 C 489

where instrument is necessary for complete adjudication of rights, complaint failing to allege it may not be defective; but it should be pleaded by way of cross-complaint, 72 C 86

counterclaim, how pleaded, 73 C 534, 75 C 455

no recoupment can be had, unless pleaded, 76 C 126

only cross-complaint or counterclaim can be basis of affirmative relief for defendant, 76 C 290, 695

using cross-complaint to seek remedy which might otherwise be lost under rule of res adjudicata, which includes defenses actually interposed and those which might and ought to have been made, 76 C 322

nature of counterclaim and set-off; right of plaintiff to withdraw case after it is filed, 76 C 530, 80 C 218

court may permit filing of counterclaim after all evidence heard, 79 C 79

mere claim for damages does not constitute a counterclaim unless supported by averments of fact justifying judgment for damages, 79 C 455

matter proper for counterclaim may be made basis of separate action, 79 C 693

State, seeking equity, is subject to cross-complaint, 81 C 9

where contract is mutually rescinded and amount due thereon is made part of purchase price of another contract, in action for goods delivered as a part of that price, after breach of contract, former contract not basis of counterclaim, 81 C 343

cannot recover for defective quality of goods and overpayment unless such damages were claimed in pleading, 81 C 479

an offset, set up in complaint, need not be made more specific, as it is matter of defense, 82 C 175

judgment on, should be as favorably regarded and supported as though it were on the complaint, 83 C 671

under a counterclaim, defendant cannot bring in matter not so connected with the allegations of the complaint that its consideration is necessary to determine rights of the parties, 84 C 437

if an action is brought on contract, and the counterclaim founded on tort, demurrer to counterclaim will be sustained, 84 C 437

cross-complaint relates back to commencement of action, 85 C 83

cross-complaint for mutual mistake in an instrument is not demurrable; need not allege fraud nor previous demand, 85 C 83

election to stand on one of two counterclaims, under order of the court, prevents recovery on the other, 88 C 620

counterclaim is in effect an independent proceeding as regards costs, 91 C 657

in action for account, no cross-complaint or counterclaim for amount found due is necessary, 93 C 146

if amount in demand does not appear in complaint, it may appear in cross-complaint, 95 C 66

defendant may deny allegation as to price agreed upon in sales action and counterclaim for fraud in sale, 100 C 393

—in effect two independent actions and could have been brought as such, 100 C 393

defendant not entitled to damages unless he counterclaims under statute, 101 C 60

allegations of counterclaim *held* to put defendant's damages in issue, 101 C 416

Statute of Limitations as to mechanic's lien applies when it is pleaded in cross-complaint, 101 C 659

—where filed in foreclosure suit, service on plaintiff sufficient though owner of equity and codefendant not served, 101 C 659

—but no judgment could enter against the latter, 101 C 664

—effect of requirement of service in rules of court, 101 C 664

properly pleaded though "by way of set-off" omitted, 101 C 736

claim for relief in counterclaim may be variously stated; mere claim to recover damages *held* sufficient, 102 C 152

objection to form of counterclaim must be raised in trial court, 102 C 152

if an independent cause of action, not mere recoupment, is pleaded it is open to attack on same grounds as would be an independent action, 103 C 36

—in action by United States, counterclaim can be filed only if such action would lie, 103 C 36

allegations of cross-complaint not available to supply omissions from answer, 107 C 491

where answer to action on note set up release of obligation on it in consideration of cancellation of defendant's claim for board of plaintiff, he could not recover for that board in any event because not pleaded as set-off or counterclaim, 109 C 1

counterclaim in tort not permissible in contract action unless so connected that consideration necessary for full determination of rights, 110 C 528

—set-off confined solely to contract actions, 110 C 528

§ 22 Pleading

- counterclaim for malicious prosecution by bringing action for same breach of contract in another State is improper, 110 C 531
- should be stricken out on motion, 110 C 531
- recoupment for breach of warranty in diminution of purchase price must be pleaded as counterclaim, 114 C 422
- where defendant pleaded that rendition of services was agreed to be applied on amount due plaintiff and also counterclaimed for those services, judgment for plaintiff for the balance over value of services does not entitle defendant to costs, 116 C 371
- cross-complaint by receiver against claimant to recover unpaid stock subscription equivalent to bill of equity ancillary to receivership, 117 C 451
- and allowed where nonresident claimant has voluntarily submitted to jurisdiction, 117 C 445
- whether allegations, pleaded “by way of counterclaim,” were good defense to complaint, not presented by demurrer to counterclaim, 119 C 603
- withdrawal by plaintiff does not impair right of defendant to prosecute cross-complaint or counterclaim, 123 C 168
- in such a case action is still pending and plaintiff may reinstate claim, in spite of withdrawal, 123 C 169
- counterclaim based on negligence of plaintiff bank in canceling indemnity bond while receiver of defendant which would have covered latter, stricken out in suit for amount of check bearing forged indorsement, 123 C 618
- counterclaim for money damages for partial eviction had no place in action of summary process, 125 C 543
- factors affecting damages which belong in counterclaim as distinguished from special defense, 126 C 554
- matter in counterclaim must be so connected with original issue that its consideration is necessary to full determination of rights of parties, or be a claim by way of set-off, 128 C 312
- stranger cannot be cited in so that matter foreign to controversy may be litigated, 128 C 312
- cross-complaint proper where claim is so related to that in complaint that consideration of former is essential to full adjudication of latter, 129 C 34
- in suit by passenger of bus against bus company and owner of automobile which collided with it, cross-complaint by latter against bus company properly stricken out, 129 C 34

§ 23. Reply and Subsequent Pleadings

- justification by authority of inferior court; reply of no jurisdiction is insufficient unless apparent on record, K 110
- rejoinder of nonperformance after plea of “no award,” *held* a departure, K 364
- so of matter of excuse of nonperformance after plea of performance, 5 C 373
- replication setting forth award need not aver performance, when, K 364
- what replication to plea of fraud and duress is sufficient, 1 R 217
- when plea of defendant makes it necessary, plaintiff may in replication substantiate in legal sense the averments of declaration; no departure, 2 R 388
- Statute of Limitations a good replication to plea of set-off, 9 C 364
- new assignment in trespass is unnecessary in replication, when, 10 C 322
- suit on probate bond; plea of performance: reply must disclose nature of claim, 13 C 499
- plaintiff need not reply estoppel in pais to plea of nul tiel record with notice, 28 C 527
- general issue with notice as rejoinder, 33 C 352
- plaintiff bound to assign breach after plea of performance generally, 33 C 495
- aliter, to plea of statutory general issue, 33 C 495
- replication of trust, to plea of levy as husband’s, *held* no departure, 36 C 105
- reply of fraud need not set out in what the fraud consisted, 42 C 224
- more general averments allowed in replication, 42 C 225
- replication that horse was gentle and was frightened by object on highway, *held* sufficient, 42 C 295
- on demurrer to rejoinder, issue presented was wholly whether A was de facto officer; if plaintiff wished to take advantage of fact that service was at unlawful hour, should have new assigned and set up that fact in replication, 46 C 219
- complaint for assault and battery; justification as constable; reply denying answer admits sufficiency of defense in law, 51 C 432
- the replication must be consistent with the declaration, 60 C 84
- this rule is retained in substance in the Practice Act, 60 C 84
- should not be called defense, 75 C 356
- including denials and matter in avoidance; denials and demurrer, 75 C 356
- division into counts discountenanced, 75 C 356
- function of reply; cannot be made basis for claim of affirmative relief, 79 C 687

new promise relied upon by plaintiff to be pleaded in reply to answer of Statute of Limitations, 84 C 137
 error to strike out a reply that might possibly have been proved, 85 C 272
 failure to deny allegations of special defense as admitting them, 102 C 642
 filing of reply operates as withdrawal of undetermined demurrer, 104 C 291
 office of reply is to meet matter averred in answer, 116 C 671
 —should not be used for purpose of obtaining distinctive affirmative relief, 116 C 671
 after demurrer to special defense is overruled, it is incumbent on plaintiff to reply, and if he does not, final judgment should be entered against him, 117 C 588
 cause of action not stated in complaint may not be interjected into case through medium of reply, 126 C 608
 —allegation of fraudulent concealment, contained in reply to meet defense of Statute of Limitations, not effective to afford plaintiff a cause of action, 126 C 611

§ 24. Exhibits, References, Oyer and Profert

writing declared on as lost or in defendant's hands; defendant cannot have oyer without denying such averment, 2 R 128, 317, 483
 oyer of court records must be given if records are not kept where trial court sits, 2 R 462
 loss, good excuse for not producing writing on oyer, 2 R 482
 action on policy; court will not compel production of papers connected with the vessel, 5 D 413
 complaint need not make profert of simple contract, 5 C 106
 —must make profert of specialty, or give reasons for failure, 5 C 331
 charter of turnpike company should be set out, 7 C 92
 description by reference to schedule insufficient, but a defect of form merely, 40 C 106
 no profert of bond required in suit on interest coupons, 41 C 542
 contestants of a will are not necessarily entitled to an order for books showing accounts of confidential agent who is chief legatee, 59 C 243
 —such an order is in the discretion of the court, 59 C 243
 allegation that "it appears from the records" in another action does not make those records a part of pleading, 74 C 456
 exhibits need not be attached to pleadings; motion by opponent to inspect, is proper, 75 C 455

effect of attaching exhibits, 81 C 668
 where writings are set forth, under order of court, for the purpose of satisfying Statute of Frauds, it may be assumed that there are no other writings, 83 C 120
 discretionary with court to order paper referred to in pleading to be attached to it, 86 C 561
 court can order a copy of an order to be annexed to complaint, 86 C 561
 exhibit attached to complaint is part of record as regards writ of error, 119 C 224
 insurance policy filed on order of court in pursuance of demand for oyer becomes part of pleadings and is part of record, 119 C 416
 document filed by plaintiff as a result of motion for oyer becomes part of complaint, 119 C 416
 exhibit annexed to pleading becomes a part of it and controls allegations in it, 127 C 709
 transcript of proceedings before liquor control commission, annexed to answer as exhibit, becomes part of pleading, 127 C 710

§ 25. Motions on Pleadings

special pleading on interlocutory motions is not favored, 18 C 91
 scandalous averments will be stricken from complaint on motion, 32 C 168
 bill of particulars if not specific enough can be made so by application to court, 54 C 327
 —but objection first made after trial is too late, 54 C 327
 refusal of court to strike out parts of complaint previously admitted to be true in answer, *held* no error, 54 C 427
 motion to strike out as remedy when there is a departure, 60 C 84
 motion to strike out certain counts, or elect upon which to go to trial, is largely in the discretion of the court, 63 C 39
 motion lies to strike out paragraph alleging no essential fact, 64 C 482
 —so allegation that defendant is a common carrier where that fact does not enter into case, 65 C 201
 motion to expunge is to be denied if, to grant it, would weaken complaint as regards a demurrer, 67 C 452, 90 C 495
 discretion of court as to motion to expunge, 71 C 172
 motion to expunge cannot take place of demurrer or attack irrelevancy, 71 C 709
 motion for allowance of amendment ought not to determine its sufficiency, 72 C 167
 motion proper way to suggest dissolution of corporation or death of party pending action, 73 C 151
 inaccuracy of expression not ground for motion to strike out, 73 C 432

§ 25 Pleading

- motion to inspect exhibit referred to but not filed, 75 C 455
- motion does not lie, to have plaintiff credit payments on bill of particulars, 75 C 616
- motion for more specific statement rests in court's discretion; to be carefully applied, 75 C 616
 - as applied to replevin, 77 C 461
- motion that defendant be forbidden to make use of certain judgment in defense, 77 C 283
 - determination of sufficiency of judgment as a defense in this informal manner waived by failure to object, 77 C 281
- if motion to strike out is general and cannot prevail in its entirety, motion fails, 77 C 638
- reply waived right to move to have defense expunged; but court may still expunge it, 78 C 99
- motion to strike out similar allegations in several defenses or consolidate defenses; former relief may be granted, 78 C 100
- motion to strike out defense should not determine substantial rights, 78 C 276, 71 C 166
- power of court to restore case to docket on motion by plaintiff, 80 C 218
- right to more specific statement waived by general denial, 80 C 335
- motion to expunge to be granted only where defect is plain; statement not necessary but not irrelevant, need not be stricken out, 80 C 498, 82 C 635
- motion to quash mandamus takes place of demurrer, 81 C 645, 83 C 554, 90 C 639
- motion to consolidate actions discretionary; denied where construction of statute and constitutional question are involved, 82 C 2
- motion to make offset, alluded to in complaint, more specific denied, as offset is a matter of defense, 82 C 175
- irrelevant and evidential matter attacked by motion, not demurrer, 82 C 624
- stating of facts leading up to an agreement is subject to erasure by motion; not demurrable as stating distinct causes of action, 82 C 647
- when proper and improper grounds of damages are alleged, motion to expunge and not demurrer is proper remedy, 84 C 111
- court not bound to expunge argumentative denials but may do so on motion or of its own accord, 85 C 84
- motion to expunge does not take place of demurrer or motion to strike out, 85 C 394, 398
- motion to strike out used rarely; to remove a pleading or motion that is sham, frivolous, scandalous, or improperly pleaded, 85 C 395, 398
- indiscriminate motions to expunge and correct should be discouraged when speedy hearing desired, 85 C 395, 398
 - immaterial and irrelevant matter generally of no consequence, 85 C 395, 398
- in action for wages and money expended, a motion to state the arrangement between the parties is addressed to the discretion of the court; no error if denied, 85 C 513
- motion to erase an amendment improperly allowed is proper, 86 C 313
- motion to expunge cannot test legal sufficiency of pleading, 86 C 561
- motion to make specific lies to remonstrance to committee's report; is discretionary, 87 C 242
- allegations of evidence may be expunged on motion, 88 C 590
- motions to expunge for immateriality and irrelevancy have limited scope; leaving these in pleading generally does no harm, 88 C 590
- motion to strike out of third defense so much as is pleaded separately in second defense, denied where material facts are incorporated with those of third defense, 90 C 491
- motion to separate defenses denied if it would weaken defense on demurrer, 90 C 492
- motion for more specific statement should be filed before answer; if not, defects of formal nature are waived, 91 C 5
- that claims to set aside deed and to recover damages for breach of covenant be placed in separate counts, even after one trial, 91 C 214
- motion required for more precise description of negligence charged, 91 C 388
- where parties enter by wrong door to defend, motion to strike from record entry to prosecute is proper, 91 C 680
- evidential matter may be expunged, 92 C 293
- motion for more specific statement protects one from surprise, 94 C 167
 - must be made within proper time to be urged on appeal, 94 C 276, 481
- allegations in answer which merely repeat those of complaint should be stricken out on motion, 95 C 399
- motion to expunge claiming all material allegations of complaint are immaterial and irrelevant is in effect a demurrer and improper, 95 C 589
- motion to have allegations made more specific, 97 C 593
- where in action on judgment want of jurisdiction is pleaded, allegation setting forth nature and scope of action and annexing judgment roll need not be expunged, 98 C 251
- recital of devices by which bankrupt sought to cover up fraudulent transfers is properly expunged as evidential, 99 C 307
 - so allegations seeking to anticipate defense, 99 C 307

—error in latter case would be harmless if evidence on point is admitted on trial, 99 C 307

motion to strike out pleading merely repeating issues already overruled proper, 101 C 438

motion to quash alternative writ of mandamus is equivalent to a demurrer, 103 C 607

motion to expunge has limited function and cannot take place of demurrer, 104 C 68

motion to expunge has limited scope; only proper when defect is plain, 104 C 542

motion to quash in mandamus is equivalent to demurrer, 104 C 544

motion to make more specific general allegation of negligence, 105 C 693

effect of failure to move for more specific statement, 106 C 41

suggestion of judge after trial that further evidence be heard under second count which was withdrawn *held* equivalent to granting motion to restore it, 107 C 380

substantial rights should not be determined on motion for permission to file pleading, 108 C 679

motion to strike out counterclaim in contract action based on cause of action for tort is proper, 110 C 531

no object in filing motion to strike out motion to dismiss, 112 C 593

discretion of court to refuse to expunge allegations not wholly irrelevant or immaterial, 115 C 100

motion for more specific statement properly denied where all facts demanded were already accessible to defendant, 116 C 380

motion for more specific statement of acts of fraud committed, properly denied where specific acts were set out in complaint in detail, 116 C 381

motion for more specific statement; when matters sought to be stated were of evidential nature court did not abuse discretion in denying, 116 C 455

where legal conclusions are alleged as elements going to support of single cause of action, motion to expunge is proper remedy, 117 C 230

motion for more specific statement, setting forth what particular statutes and ordinances were violated by defendant driver, properly refused, 119 C 310

—rests in discretion of court, 119 C 314

action on motion for more specific statement discretionary, 121 C 77

question of plaintiff's legal rights should not be determined on motion to expunge, 122 C 306

where granting motion for more specific statement did not prevent plaintiff from proving its cause of action or make its burden heavier, error would be harmless, 124 C 490

in complaint to recover money lost in gambling, motion for specific statement of items, dates of bets, names of horses properly denied under provisions of statute, 125 C 113

denial of motion to withdraw cross-complaint within discretion of trial court, 125 C 472

motion to expunge allegations covering prior negotiations properly denied where they tended more clearly to disclose actual situation involved in controversy, 126 C 37

motion to quash equivalent to demurrer; is to be determined on facts alleged in alternative writ, and affirmative facts should not be alleged in it, 126 C 215

motion to expunge defense and cross-complaint alleging matter which was adjudicated in previous case, properly granted, 127 C 149

certain defenses containing only allegations provable under denials in answer, properly expunged, 127 C 149

granting motions to expunge rarely serves useful purpose, 127 C 154

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—unless it is affirmatively shown that party suffered prejudice from rulings he can claim no relief, 127 C 582

where motion for more specific statement would be proper in action for fraudulent representation, 129 C 17

§ 26. Amendments

§ 27. —In General; Power of Court

when allowed, without costs, 3 D 497

Supreme Court has discretionary power of allowing, in cases reserved for advice, 4 C 297

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statute de, to be liberally construed, 26 C 201, 39 C 535

improper amendment if allowed, may be erased on motion at any time, 32 C 375

—if made without authority, there is no waiver until party has actual notice, 32 C 375

right of party, within statute, to change his plea, 33 C 256

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allowance or disallowance of, matter of discretion, 38 C 180, 39 C 535, 41 C 540

—error cannot be predicated on such ruling, 38 C 180

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§ 27 Pleading

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allowed in appellate court to same extent as if case was first brought there, 43 C 50

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costs paid on amendment of complaint cannot be recovered on final judgment, 50 C 521

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allowance of amendment within the discretion of the court, when, 51 C 398

—cannot be reviewed on a proceeding in error, 51 C 399

formal and technical objections should be made known as soon as possible so plaintiff may amend or proceed anew, 53 C 52

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a copy substituted for lost original; a count added to copy may be regarded as amendment, 56 C 571

—on restoration of original, amended copy may be retained as, 56 C 571

Supreme Court in case reserved will advise an opportunity for, if such course will best serve the ends of justice, 60 C 84

refusal to allow amendment of return after immaterial amendment of alternative writ of mandamus *held* harmless, 61 C 577

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as to refusal to allow amendment insufficient in law, 72 C 167, 76 C 629, 77 C 15, 78 C 310, 79 C 401, 458

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where demurrer would be unavailing, court may refuse permission to replace plea with it, 74 C 38

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failure to allow, harmless, if all evidence is admitted under present pleadings, 82 C 479

court should give ample time after amendment for new evidence, etc., 83 C 417, 91 C 448

of petition for new trial is discretionary, 83 C 477, 91 C 23

tribunal lacking jurisdiction cannot allow amendment setting it up, 85 C 517, 530

motion to erase an amendment improperly allowed is proper, 86 C 313

replacing motion to disclose with another motion, 90 C 261

defendant cannot object to amendment if he has chance to reply, 91 C 448

increasing damages beyond jurisdiction nullity, 92 C 209

after amendment during trial to conform to proof, other party should have reasonable time to amend answer, 96 C 394

—but need not be given opportunity to demur, 96 C 394

right of court to restrain alteration of pleadings in order to reach issue, 96 C 395

power to amend assumes existence of original complaint, and, if none, substitute cannot be filed, 97 C 399

amendable defect in complaint must be objected to seasonably, 99 C 640

allowance of amendment is within sound discretion of trial court, 106 C 220, 108 C 622, 114 C 614

—only reviewable in event of abuse, 108 C 622

where court becomes satisfied that there is a fatal variance, it may well suggest or even direct an amendment, 114 C 199

that litigious plaintiff refused to make settlement court thought fair and that trial of other cases would be delayed no ground for disallowing, 114 C 614

courts do not ordinarily refuse formal amendment to cure defect in pleadings, 114 C 617

where court refused amendment by plaintiff, denial of permission to withdraw action or of motion for nonsuit was within court's discretion, 114 C 619

circumstances govern action on amendment due to mispleading, such as delay, fairness to opposing party, etc., 115 C 683

never matter of absolute right; sound discretion of court; but should not be denied to remedy mispleading except for sound reason, 115 C 683

while statute de amendments at inception intended to apply to amendments before trial, policy it established has been followed as to those offered during trial, 115 C 683

judgment *held* to have been based on issues raised by amended complaint and original denial and plea of payment which still stood as defendant's answer, 116 C 314

after amendment, by rule adverse party is entitled to alter pleadings within ten days; if he does not, existing pleadings if applicable stand, 116 C 314

—therefore judgment should not be entered until such ten days have elapsed; should not be directed to enter forthwith on filing of amendment, 116 C 314

—after period has expired and no further pleading or request to present further evidence has been filed court may enter judgment on amended pleading, 116 C 314

—but action in so doing is open to attack on ground of abuse of discretion, 116 C 314

—otherwise court may cite parties in to submit further evidence or order a retrial, 116 C 314

—suggestion in memorandum of decision that if amendment is filed conforming to proof judgment will be rendered for plaintiff *held* not improper, 116 C 314

where evidence of payment was admitted upon promise of attorney to file amendment to answer alleging payment and that amendment was filed, this was adequate to support conclusion of payment, 116 C 728

substantive rights not to be determined upon motion for permission to amend, 117 C 97

—so refusal to allow amendment setting up facts to show assumption of risk as defense, on ground that it would not defeat action under guest statute, error, 117 C 97

allowance of amendment to appeal from administrative board after evidence in, rests in court's discretion, 118 C 179

action of court in permitting amendments is discretionary and can be reviewed only when discretion abused, 120 C 264, 124 C 10

refusal to strike out amendment is in discretion of the court, 121 C 77

appeal from City Court is process within statute concerning amendments, 122 C 154

amendments freely allowed by statute, by rule, and by practice, 124 C 12

court's duty to suggest or direct amendment where there is variance, 124 C 304

omission to allege agency could have been cured by amendment and defendants should have objected seasonably so that plaintiffs might have opportunity to amend, 124 C 501

amendment during trial never a matter of right; rests in discretion of court, 125 C 80

alternative writ in mandamus stands in place of complaint in ordinary civil action and the return in place of an answer, 126 C 538

—amendment of petition and of alternative writ in nature of amendment of prayers for relief of a complaint, 126 C 539

where case tried on merits, party not permitted after judgment to take advantage of defects in procedure which could readily have been amended, 126 C 579

refusal to permit amendment harmless even if erroneous where issue involved was tried and determined, 126 C 644

policy in allowing amendments to pleadings is liberal; ordinarily matter rests in court's discretion, 129 C 391

§ 28. —Time Allowable

amendment after plea in abatement, K 5, 2 R 525

plea may be amended at trial, 1 R 75

plea may be changed during jury trial, 1 R 434, 2 R 406, 3 D 315

when allowable, after statute has barred a new information, 10 C 472

—new count not allowed, if offense be barred by statute, 12 C 106

not ordinarily allowed after arrest of judgment, 13 C 471

—allowable, if irretrievable loss would otherwise ensue, 13 C 472

confined to time proceedings are in fieri, 15 C 37

allowance of new count after first term, no ground of error, 18 C 387

insertion of partners' names after third day of term, allowable when, 19 C 62

court has discretion to allow amendment of petition any time before decree, 25 C 528

—if new facts are alleged, a new hearing as to them should be had, 25 C 528

peculiar circumstances may justify amendment of bill after decision on case reserved for Supreme Court, 27 C 470, 60 C 84

description of railroad company amendable after trial begun, when, 29 C 470

amendment of misjoinder of counts pending motion in arrest, disallowed, 31 C 447

change of plea; time within which change is to be made, discretionary, 33 C 257

allowable after evidence is in and arguments begun, 35 C 326

allowable after reversal of judgment, in court's discretion, 39 C 357

allowable after new trial granted, 39 C 535

covering different facts, *held* properly refused after trial, judgment, motion in error and reversal, 51 C 399

under Practice Act, appeals from justice court may be amended later than first term at discretion of court on payment of costs, 52 C 3

of complaint in Superior Court pending decision of United States court as to removability to latter, is proper, 54 C 33

—where cause is held by United States court as not removable, 54 C 33

should not be allowed after hearing in damages, as basis for judgment for exemplary damages, 64 C 482

after case partially heard, 64 C 556, 69 C 264, 641

bringing in cross-complaint after case remanded on reservation, 68 C 369

amendment after evidence all in necessitating new trial not allowable, 69 C 404

at any time before judgment; after hearing in damages; right and effect, 69 C 554, 83 C 417, 86 C 453

amendment enlarging the issue, if offered at late stage in proceedings, in court's discretion, 70 C 700

at law, matters subsequent to bringing of action cannot be brought in by amendment, 73 C 385 and 71 C 418

—as to equitable action, see 76 C 292

§ 28 Pleading

- amendment of plea in abatement after time expired for filing allowed, when, 73 C 428
on trial, 74 C 62, 76 C 680, 82 C 343
after stay of action under bankruptcy law, 74 C 616
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after demurrer sustained; discretion of court, 75 C 308
is of right within thirty days after return day, 75 C 544
after judgment for accounting, 76 C 292
if case remanded by Supreme Court for error in damages alone, not allowable, 77 C 667
filing counterclaim after all evidence in, in court's discretion, 79 C 79
amending complaint two years old after repeated amendments rests in court's discretion, 81 C 451
clerical amendment as of ad damnum, allowed at any time before verdict, 81 C 474
during trial to cure variance, 82 C 343, 83 C 671
it is discretionary to allow an amendment of a pleading during trial; may be reviewed if abused, 82 C 479, 83 C 417, 91 C 448
discretionary to allow amendment after jury impanelled, 83 C 311
complaint amended to accord with evidence received if chance is given to other party to answer, 83 C 417
discretionary to allow amendment to complaint after demurrer to plea in bar has been overruled, 85 C 271
immaterial variances disregarded and amendment allowed at any stage of trial, 86 C 453
after close of testimony is discretionary, 87 C 91
ad damnum amended any time prior to final judgment, 89 C 255
two weeks after final argument too late, 90 C 281
of right within twenty days after demurrer to original complaint sustained, 92 C 277
plaintiff permitted to amend bill of particulars and enlarge its claim where cross-examination of defendant shows falsity of account rendered to and accepted by plaintiff, 94 C 313
of complaint during trial, to conform to proof, a privilege long secured by statute, 96 C 394
—but is coupled with right of defendant to amend answer within reasonable time, 96 C 394
disallowance of amendment as to special damages offered three weeks after trial is discretionary, 97 C 447
properly refused when offered after verdict, in equitable action, where it raised no new issue, 98 C 227
—may not be made where writ is void because containing no complaint, 98 C 228
on trial amendment not allowed where evidence could not reasonably be construed to support it, 99 C 670
complaint not amendable after final judgment on demurrer, 100 C 290
amendment permissible to defendant where filing of request to charge first disclosed real nature of claim of plaintiff under complaint, to former's surprise, 100 C 747
of complaint to conform to plaintiff's evidence, may be allowed, 101 C 545
—where defendant is given opportunity to meet it, 101 C 545
—ruling of trier will only be disturbed where discretion abused, 101 C 545
refusal to permit amendment of complaint pending eleven years *held* a reasonable exercise of discretion, 103 C 491
permitting amendment after demurrer sustained is matter of discretion, 103 C 672
—properly refused if it would not avail petitioner, 103 C 672
amendment permissible after judgment in City Court and before opening of trial on appeal to District Court of Waterbury, 104 C 297
discretion of court to permit amendment to correspond to evidence, provided defendant has chance to offer further testimony, 106 C 220
amendment may be allowed any time before judgment; but other party must be given opportunity for further pleadings and proof, 106 C 468
allowance of amendment after trial; necessity of finding to present claimed error, 106 C 724
allowance after trial but before judgment where pleading already sufficient, without surprise and not making any change affecting merits of controversy not an abuse of discretion, 109 C 292
appeal from probate cannot be amended in Superior Court as it is part of Probate Court proceedings, 112 C 458
allowance after evidence was in within discretion of court, 113 C 402
—claim that defendant not allowed opportunity to plead further or offer other evidence must be supported by finding, 113 C 402
discretion of court to allow amendment in course of trial, 114 C 230
—where subject matter had already been covered in evidence, court did not abuse discretion in denying motion to stop trial to permit investigation of matter, 114 C 230
—if, as trial developed, defendant was unable to meet evidence offered without further time to investigate, motion for continuance might have been made, 114 C 230
no abuse of discretion in court's allowing amendment after close of evidence alleging

wrongful conduct on part of party added as defendant, 115 C 499

under rule permitting amendment "at any stage of the trial" where there is variance court may permit it at any time before judgment and may suggest or even direct it, 116 C 314

—action discretionary and can be reviewed only when discretion is abused, 116 C 314

by defendant after trial and verdict, purpose of which was to shift burden of proving contributory negligence onto plaintiff, within court's discretion to deny, 117 C 428

court should have granted motion to reopen judgment and allow amendment to answer setting up defense which would have been bar to action on note under Small Loans Act, where defendant filed motions promptly, 120 C 190

within discretion of court to allow amendment after close of plaintiff's evidence to correspond accurately with facts proven and not changing essential issue or prejudicing defendant, 120 C 259

where failure to specially plead defense of lack of consideration prevented defendant from offering evidence on issue at original trial, justification for allowing amendment after judgment opened, 125 C 728

§ 29. —Propriety Generally

amendment of record where issue misjoined allowed, pending motion in arrest, K 344

general demurrer cannot be altered to special, 1 R 387

declaration adjudged insufficient may be amended, 1 D 206

"ground of action" refers to real object of party, 24 C 39

if amendment asked would prove unavailing, it should be denied, 25 C 530

raising damages on appeal, to sum beyond jurisdiction of lower court, 32 C 207

—effect of doctrine of relation back to commencement of suit, 32 C 208

—objection, if valid, is waived by going to trial in appellate court, 32 C 208

bill of particulars, when forming criterion of court's jurisdiction amendable so as to confer jurisdiction, 39 C 136

if facts found differ materially from those alleged, petitioner must amend his bill before he can obtain relief, 41 C 369

ground of action not changed, if amended pleading sets out, or is founded on same transaction, 43 C 52

immaterial amendment of complaint after evidence is in; *held* defendant could not plead anew and retry case, 57 C 157

—especially where amendment did not operate as a surprise, 57 C 157

opportunity should be granted for, if plaintiff can bring case within jurisdiction thereby, 60 C 84

new counts may be inserted which might have been in original complaint, 60 C 399

—complaints for breach of contract may be changed to tort and vice versa, under certain circumstances, 60 C 400

—may be amended to correspond with facts proven and to relief to which party entitled, 60 C 400

under statute, cause of action must not be entirely different when change of plaintiffs is allowed, 60 C 400

cannot amend on appeal so as to abandon cause of action for another within original jurisdiction of appellate court, 62 C 157

"ground of action" under statute, defined, 62 C 373

amendment to avoid variance allowable, when, 63 C 166

refusal to allow amendment, after two successive demurrers sustained, by adding second count not ground of appeal, 66 C 284

amendment following one of several grounds set up is allowable, though it includes other matters, 72 C 172

changing ground of action; adding new count, 73 C 585

supplying omission in ad damnum clause, 75 C 541, 650

amendment destroying jurisdiction after defendant's appearance, 75 C 621

where ad damnum clause is omitted or damages claimed are below jurisdiction of court, 75 C 654, 89 C 255

of claim does not change action if object is the same, 81 C 434

increasing amount named in ad damnum clause, 81 C 474

variance between allegation and evidence that does not amount to entire failure of proof is matter of amendment, 82 C 343

amendment is allowed to accord with evidence received, if opponent is permitted opportunity to rebut it, 83 C 417

if complaint shows judge had no jurisdiction, it cannot be amended to give jurisdiction, 85 C 517

must amplify original statement or add cause of action legally joinable, 86 C 308

new cause of action by amendment may be proper if parties are before court; otherwise, if they are not, 86 C 308

if it will not cure defect raised by demurrer, disallowed, 86 C 326, 91 C 84

variance in a complaint can be corrected by amendment except where there is a disagreement in some matter essential to the charge or claim, 86 C 453, 87 C 90, 89 C 254

must be allowed if denying it prevents party from presenting cause of action, 86 C 561

§ 29 Pleading

defective statement of cause of action may be amended; statement of defective cause of action cannot be amended, 87 C 634
of ad damnum clause because judgment exceeds damages claimed, 89 C 254
amendment not adding any material allegation properly refused, 91 C 84
there can be no objection to an amendment if one has chance to reply, 91 C 448
a court of limited jurisdiction cannot raise ad damnum clause beyond the jurisdiction by permitting the damages to be trebled, 92 C 209
amendment not altering real effect of pleading may be disallowed, 93 C 65
amendment cannot be allowed if there is no original complaint, 97 C 399
pleadings repetitious of earlier overruled pleadings not permissible, 101 C 437
—amended answer *held* to set up new matter, 101 C 437
where complaint is demurred to and substitute offered raising new question of legal liability, it is error to refuse to permit it to be filed, 108 C 679
—substantive questions of right should not be thus decided, 108 C 679
right to add by amendment special count which might originally have been joined, 112 C 64
discretion of court to permit amendment to plea in abatement to insert prayer for relief, 113 C 771
substitute complaint containing nothing to obviate defect in original properly struck from the file, 116 C 722
disallowance of amendment not materially changing issues not ground of error, 118 C 180
may be allowed to cure material variance at any stage of trial, 119 C 514, 120 C 264
where offered to remedy situation due to mispleading, circumstances must govern, such as unusual delay, fairness to opposing party, confusion of issues, negligence of party mispleading, 120 C 195
court may permit amendment making pleadings correspond with proof at any stage of trial, may suggest and even direct it, and its action is discretionary, 122 C 363
to complaint after demurrer sustained properly denied where, if allowed, it would not have materially changed issues, 124 C 237

§ 30. —Particular Cases

plaintiff may strike out complaint, 1 R 86
amendment by changing Christian name and description of plaintiff, 2 R 57
declaration in trespass quare clausum fregit misdescribing the land, amendable, 2 R 119
declaration for malicious prosecution not amendable into one for conspiracy to get up a prosecution, 2 R 199

bill to redeem averring fraudulent refusal to give defeasance, 2 R 277
—not amendable by striking out such averment and alleging that defeasance was given, 2 R 277
of qui tam action, not allowed where new action would be barred, 4 D 42
informations, public or qui tam, in rem or in personam, are open to, 10 C 472
words “sitting as court of chancery” stricken from highway petition, 11 C 385
accused allowed to withdraw plea and interpose one of prior class, 19 C 488
of declaration for rent, by showing assignment and how plaintiff became assignee; not a change in ground of action, 21 C 180
of petition for highway changing the proposed layout, when proper, 22 C 231
—new hearing presumed after such amendment, 22 C 232
declaration for nondelivery; insertion of time, place, and manner of reception, allowed, 24 C 39
by setting out new incumbrances in action of covenant, allowable, 26 C 201
count for negligence may be added to two charging false warranty and fraud, 30 C 309
amendment claiming other goods covered by warranty, does not change ground of action, 32 C 376
—nor does a further count for fraudulent representations, 32 C 377
new counts in slander alleging other words of same general character spoken at other times, allowable, 33 C 337
counts in debt and covenant may be added to count in assumpsit on lease, 39 C 356
—such amendment does not change ground of action, 39 C 356
petition against nuisance failing to aver party was aggrieved, amendable, 39 C 428
filing note under common counts does not give defendant right to amend plea without costs, 45 C 301
filing of a new information by state’s attorney is not a new accusation, 49 C 437
—merely a continuation of proceedings begun by grand juror, 49 C 437
under Practice Act, complaint against administrator may be amended to charge defendant personally, 57 C 304
executor asking construction of will, cannot amend to remove cloud as trustee, the causes being different, and an executor and trustee being distinct persons, 60 C 399
“ground of action” under statute defined, 62 C 373
—original claim before commissioners alleged breach of parol agreement to convey land in consideration of services; amended on appeal to quantum meruit; *held* to change ground of action, 62 C 371, 375

—Statute of Frauds would have prevented enforcement of original claim, 62 C 373
 addition of count in contract to complaint alleging fraud only, on which defendant's body had been attached, *held* error, 63 C 370
 complaint for goods sold may be amended to allege conversion, 66 C 500
 amending plea in abatement, 68 C 474, 74 C 125
 amending pleadings in condemnation, 69 C 469
 complaint for partnership accounting amended to allege possession of property under ostensible partnership, 71 C 623
 after claim disallowed, substitute statement alleging facts to justify recovery for value of services permitted, 72 C 167
 amending prayer for relief, 72 C 201
 on appeal from disallowance of claim on insolvent estate, 73 C 582
 complaint alleging that defendant's wife borrowed money as his agent, amended to allege that she secured money on his note, 74 C 689
 amendment of claim against insolvent estate on appeal *held* not to change ground of action, if real object is the same, 81 C 433
 in complaint for injury to employee of railroad, it should be stated whether it is under common law or federal statute; amendment allowed, 87 C 634
 petition for new trial *held* insufficient on demurrer may be amended at court's discretion, 91 C 24
 if pendency of another action is alleged, can amend to set up judgment therein, 91 C 317
 amendment changing date in complaint, 95 C 576
 on trial, count for money loaned may be added to one for securing it by undue influence, 98 C 201
 —opportunity should be given to defendant to answer and cross-examine further, 98 C 201
 —but amendment does not change real ground of action, 98 C 205
 under plea of payment where plaintiff gave credit for certain sum as paid, he could not prove less sum paid without amendment, 100 C 698
 complaint not amendable to include count under statute permitting attachment of debtor's body unless such attachment permissible under all counts, 105 C 679
 to permit complaint for negligent death in New York based on Connecticut law to be amended to base it on New York law not abuse of court's discretion, 108 C 436
 complaint alleged alienation of affections in 1930; amendment to extend its allegations to prior years should have been granted, 115 C 683

amendment allowed to complaint of fraud in dealing with checks *held* not to have essentially changed cause of action or issues presented, 116 C 314
 —moreover defendant did not within ten days amend answer or request opportunity to produce further evidence, 116 C 314
 in equitable proceeding it is proper to amend complaint to include default in payment of interest after the action was brought, 116 C 666
 complaint susceptible to amendment appropriate to alternative claim of joint liability and remedy by way of contribution, 117 C 24
 error for court to refuse amendment setting up defense that plaintiff needlessly and recklessly exposed herself to risk and danger of riding in automobile whose driver she knew to be incompetent, 117 C 97
 amendment not offering surprise to defendant who objected but finally assented by saying "That is all right," properly allowed, 117 C 105
 exclusion of substituted answer merely denying negligence of driver of plaintiff's car, subsequently admitted, *held* not harmful, 117 C 539
 —it did not amount to quasi admission, nor was it inconsistent with testimony of pleader so as to affect his credibility, 117 C 539
 amendment of complaint on notes to one for recovery on account of payments made by plaintiffs to discharge indebtedness evidenced by note, proper, 119 C 681
 —no substantial change in cause of action, 119 C 681
 —defendants afforded opportunity to meet amendment by pleading and availed of it to extent of eleven defenses, 119 C 681
 in divorce action for adultery, changing date from October 3 to October 7 not prejudicial and within discretion of court, 120 C 161
 amendment reciting statute requiring red light where load extends beyond stationary floor of truck was to make pleadings conform to proof, and permissible, 120 C 596
 refusal of court to strike out amendment to complaint and to grant defendant's motion for more specific statement in discretion of court, which was not unfairly exercised, 121 C 77
 court's finding that relator was not appointed chief deputy commissioner but only deputy commissioner decisive of case as pleaded, 121 C 237
 —but since proof was that he was deputy commissioner and case was one involving public interest, court should have directed amendment reflecting true situation, 121 C 237

§ 30 Pleading

defect in taking appeal from City Court to next term of Court of Common Pleas instead of next or next but one return day was circumstantial defect which appellant should have been permitted to amend after plea in abatement, 122 C 151

during second day of trial counsel for landlord learned of written lease between parties exempting him from liability and moved to amend answer to set it up as special defense; *held* court did not abuse discretion in denying motion, 122 C 363

allowance of amendment during trial, setting up special defense, within discretion of court, 123 C 88

case tried by plaintiff on theory that defendant's truck was stationary at time of collision; after arguments plaintiff sought to amend complaint by adding "or at very slow speed" and refused to consent to further argument by defendant; jury found truck was in motion; *held* court did not abuse discretion in denying amendment, 124 C 10

to require defendant to meet issue raised in course of trial that it altered its dam illegally without securing proper certificate, etc., would have imposed impossible burden on it, 125 C 76

court did not abuse discretion in refusing amendment to complaint after evidence in, which would introduce new element in case involving further testimony, 125 C 616

in exercise of discretion court did not err in permitting amendment to petition in mandamus and in amending writ, when defendant not prejudiced and no new issue presented, 126 C 539

refusal to allow amendment requiring repleading by other party, after day of discussion of case with judge just before trial, sustained, 129 C 391

§ 31. —Operation and Effect

when granted it relates back to commencement of suit, except when such fiction operates unjustly, 22 C 232

effect of doctrine of relation back to commencement of suit, 32 C 208

immaterial amendment after evidence is in does not authorize defendant to plead anew and retry case, 57 C 161

a count stricken out is out of the case for all purposes; can only be restored by leave of court, 62 C 158

where original complaint for goods sold was amended to tort, debt could not be set off, 66 C 500

on filing of substitute, pleading drops out when, 67 C 377, 71 C 424, 74 C 128

amendment waives right to review of rulings on original pleading, 68 C 504, 71 C

424, 72 C 196, 217, 257, 75 C 643, 79 C 79, 80 C 348, 549, 81 C 415, 474

—though filed under order limiting time therefor, 81 C 415

amendment relates back to commencement of action but not if prejudicial to defendant, 69 C 554

defect cured by amendment causes demurrer on that ground to be overruled, 71 C 632

original complaint to recover lands replaced by one dropping a party, 81 C 702

if amendment is immaterial, not justified in re-filing defense already held insufficient, 92 C 341

amendment operates as withdrawal of original complaint and removed a ruling on demurrer in regard to it, 93 C 479

mere change of date in complaint does not reopen so as to justify claim for jury by defendant, 95 C 576

—and rarely would justify continuance, 95 C 576

replacing one complaint by another removes ruling on demurrer to former from case, 98 C 305

defense, demurred to and voluntarily replaced by another drops out of case; no appeal lies from rulings upon it, 99 C 56

pleading replaced by substitute remains in file as part of history of case but ruling on it is not ground of error, 99 C 388

amendment substituting for corporation defendant an individual doing business as corporation will not affect garnishment, at least unless garnishee or subsequent attaching creditor has been misled, 99 C 672

an amendment of complaint relates back to commencement of action for some purposes, 101 C 218

—but not to change legal relations between the parties, 101 C 218

complaint replaced by substitute only serves as part of history of case, 102 C 398

amendment relates back to commencement of action, 105 C 640

filing new answer waived right to object to expunging paragraph in original, 105 C 672

amendment when made relates back to beginning of action as regards statutes of limitation, 108 C 436

to complaint relates back to beginning of action; error from admission of evidence thereby cured, 109 C 521

after amendment to complaint, demurrer to original complaint not available on appeal, 117 C 67

voluntary filing of substitute complaint withdraws original, 117 C 230

—thereafter latter furnishes no basis for judgment, nor can ruling as to it be made subject of appeal, 117 C 230

amendment of parties defendant dates back to beginning of action, 117 C 638

where amendment is made after trial to correspond to proof offered and neither under its allegations nor subsequent pleadings is new issue presented, court may decline to hear further evidence, 119 C 681
superseded pleading remains in case as part of its history and may constitute an admission, 126 C 614

§ 32. Filing and Service; Withdrawal and Restoration; Lost or Destroyed Pleadings

See also ACTIONS § 6

plaintiff may orally abandon part of his complaint for libel, 4 C 17
—defendant not permitted to justify the charges so abandoned, 4 C 17
entry of new plea is a waiver or withdrawal of former plea, 8 C 502
court may allow withdrawal of plea and filing of another; is a matter of discretion, 41 C 574
right to withdraw or be nonsuited, *held* not affected by plea of set-off, 43 C 61
complaint substituted by agreement for one lost, and trial and judgment thereon; proceedings *held* valid, 56 C 568
—is the same as if substituted by order of court, 56 C 570
—when original complaint is restored it takes its place as such and supports whatever has been done under copy, 56 C 571
—a count added to substituted complaint *held* to be regarded as an amendment to original, 56 C 571
—officer attaching property under original writ continues liable for the property under a substituted copy, where original is lost, 56 C 570
party desiring to plead out of established order must move the court for leave, 61 C 570
—such motion is addressed to the court's discretion and is not a ground of error, 61 C 570
withdrawal and waiver of claim for damages of same effect, 69 C 440
right of plaintiff to withdraw case after set-off is filed, 76 C 530, 80 C 218
filing of counterclaim after hearing rests in court's discretion, 79 C 79
proceedings of plaintiff to avail himself of facts alleged where he withdraws his own claim, but defendant insists on his counterclaim, 80 C 218
statement made in a pleading that is withdrawn is competent evidence, 81 C 344
order limiting time to file answer imposes no obligation to file it; it simply cuts off right to file after time set, 81 C 415
pleading can be served on one of several counsel, 81 C 452

permission to withdraw an answer and file a motion after an appeal from a ruling on the demurrer and a new trial ordered is an abuse of court's discretion, 86 C 55
if last day for pleading falls on Sunday, it is proper to file it on Monday, 90 C 713, 91 C 383
can file amendment to complaint within twenty days after demurrer to original complaint is sustained, 92 C 277
rules for time to plead not applicable to proceedings before a judge in vacation, 95 C 89
right of defendant to plead, after judgment by default, is limited; cannot then move to erase cause from docket, 97 C 123
—can only move to open default and reinstate case, 97 C 123
voluntary filing of substituted complaint a withdrawal of the original, 99 C 389
—original cannot furnish basis for a judgment, nor a ruling thereon be a subject of appeal, 99 C 389
in computing time fixed in order or rule of court, day upon or from which act is to be done is excluded, 100 C 81
copy of cross-complaint must be served on party to support judgment, 101 C 658
plaintiff, duly served with cross-complaint, cannot complain of failure to serve a co-defendant who has been defaulted, 101 C 659
statement by counsel that no claim is made on second count is equivalent to withdrawal, 107 C 380
suggestion of judge after trial that further evidence be heard under second count which was withdrawn *held* equivalent to granting of motion to restore it, 107 C 380
plaintiff has right to adjudication of cause of action upon demurrer or after issue joined; error to deny this right by refusing permission to file substitute complaint after demurrer to original complaint sustained, 108 C 676
cross-complaint filed after default without permission of court and not served properly disregarded, 112 C 450
order that return to alternative writ of mandamus be filed within time less than that fixed for pleadings in "ordinary civil actions," upheld, 115 C 98
voluntary filing of substitute complaint operates as withdrawal of original; thereafter latter can furnish no basis for judgment nor can any previous ruling on it be made subject of appeal, 117 C 230
copy of inventory filed in court in insolvency proceedings and lost, properly received without being sworn to as required by rules as to lost pleadings, 121 C 83
motion to set aside verdict; verdict Friday 6 p. m., motion mailed Saturday 10:30 a. m.,

§ 32 Pleading

received by clerk Monday, *held* filed too late, 121 C 361

—judge did not abuse discretion in holding no good cause shown why time for filing should be extended, 121 C 361

withdrawal of count does not prevent other party from taking advantage of its allegations as in nature of admissions, 129 C 469

discretion of court to permit withdrawal of count in complaint after plaintiffs had rested, 129 C 472

§ 33. Issues, Proof, Claims of Law, and Recovery under Pleadings

issue on matter in bar pleaded in abatement is immaterial, K 427

issue *held* not to be immaterial; submission, 2 R 243

traverse that defendant resides in particular town in another State, immaterial, 1 D 290

issue in fact closed to court, where declaration is insufficient, 5 D 53

—issue to be decided, then if necessary, judgment may be arrested, 5 D 53

averment of demand and notice is proved by evidence of waiver, 11 C 493

matter of aggravation, *held* immaterial when, 14 C 268

rule for ascertaining what is gist, 14 C 268

averment that assessors maliciously altered list; malice presumed if alteration is illegal, 27 C 221

right to recover rests upon, and is limited by, the facts alleged, 51 C 433

allegations insufficient but traversed and found true; it does not follow that party is entitled to judgment, though issue is found in his favor, 53 C 579

if sufficient allegations are proved, plaintiff need not prove others, though a distinct and sufficient cause of action is shown, 58 C 549

pleadings limit proof to their allegations, 64 C 394

after admitting promise to pay by note for value received, defendant permitted to disprove consideration for it under another allegation of answer, 64 C 556, 76 C 126

where, in action of libel, complaint is based on certain statements appearing in exhibit, and defendant alleges truth of all statements therein, only those relied on by plaintiff are in issue, 66 C 176

where facts in complaint set forth breach of contract, treating action as one of trover in demurrer and in arresting body of defendant does not preclude plaintiff from claiming judgment, 68 C 459

on issue of adverse possession as defense to foreclosure, any facts, as payment, showing recognition of mortgage, are admissible, 76 C 146

plea of payment permits proof of partial payment, 77 C 1, 85 C 679

allegation of knowledge can be supported by facts giving rise to constructive knowledge; so want of knowledge may be disproved, 77 C 115

denial of nonpayment permits claim of payment to be made, 79 C 38

where amount due for manufacturing goods is determined by deducting cost of certain material, denial of amount claimed puts that cost in issue, 80 C 218

recovery for negligence in care of property cannot be had under allegation of its conversion, 81 C 403

in agency it must be alleged that act was done by known agent; otherwise proof may be objected to, 81 C 492

on denial of allegation that defendant had appropriated money to his own use, he can show that he erected a building on the land at his own expense and that this expense should be allowed him, 82 C 424

complaint, alleging that shareholder fraudulently and without consideration withdrew funds, does not permit him to be held as a member of a copartnership for a benefit acquired by it pursuant to an agreement of the incorporators, 82 C 559

negligence not alleged cannot be taken advantage of, 82 C 666

denial of several material allegations raises separate issues, 83 C 109

estoppel in pais can be proved without pleading it, 83 C 394, 84 C 501

denial of assault with allegation that defendant to protect self struck plaintiff; defendant must prove that he used no more force than is necessary, 83 C 466

in appeal from assessment where one alleges that it is excessive and inequitable, lack of municipal authority cannot be claimed, 84 C 319

appeal from assessment is statutory; assessment is valid except as specifically attacked, 84 C 383

allegation of value of stock taken as part payment for goods sold is unimportant if no claim is made for return of same or credit, 84 C 463

validity of an assignment is only determined on trial if an answer denying the assignment was bona fide, 85 C 260

denial, in plea in abatement, that facts alleged in complaint show assignment to be mala fide does not raise issue as to bona fides, 85 C 266

plaintiff cannot recover for breach of implied warranty on proof by defendant of breach of warranty at other times than the time claimed, 85 C 448

a general statement may be limited by proof, 85 C 448

—as where plaintiff alleges purchase on or about a certain date and proves one such purchase; he must abide by that, 85 C 448
 where complaint is based on a defective sidewalk, recovery cannot be had on ground that there was a contractual obligation in connection with the construction of sewers that caused the defect, 85 C 689
 negligence of defendant's servant alleged and denied; it can be shown that servant was employed by independent contractor, 86 C 292
 in complaint based on negligence in blasting rocks, no recovery for liability independent of the negligence, 86 C 292
 if there are two allegations of memorandum of sale, one only need be proved, 87 C 90
 under allegation that contract for alimony was against public policy and void, testimony that parties had given false evidence in divorce suit and had agreed to live apart should be excluded as irrelevant, 87 C 377
 in action for taxes, denial of allegation that they were due and unpaid permits proof of what payments were made, 88 C 73
 allegations of negligence may be supported by conditions not set out in the complaint, 88 C 226
 statement of a witness appearing in a pleading can be used to contradict a later statement, 88 C 369
 under denial of allegation that one was ordered to use an elevator, he can prove its untruth and that he was told not to use it, 88 C 642
 in action on a policy for loss, contention that its conveyance to a friend was fraudulent is without the issue, 89 C 35
 in action for work done and material furnished at agreed price, fair and reasonable value may be recovered, 89 C 255
 in easement, allegation of a prescriptive right of eavesdrop requires proof of maintenance of a building and that it was adverse, 89 C 359
 if allegations do not show that a board acted officially, evidence can supply it, 90 C 155
 verdict must be based on some day as to which testimony of the injury is offered, 90 C 262
 one invoking jurisdiction of a Court of Probate by alleging residence cannot later say he was a nonresident, 90 C 530
 in trespass, if possession is alleged, it becomes a material fact in the case, 90 C 576
 complaint alleging performance of a building contract permits recovery with deduction for substantial performance, 91 C 287
 recovery is limited to grounds alleged, 91 C 301
 allegation that defendant carelessly drove against plaintiff's cart is sufficient to admit evidence of how accident happened, 91 C 338

where it is agreed on trial that only question is whether deed was recorded within reasonable time, the question of valid delivery cannot be raised, 91 C 421
 in appealing from probate of a will, its construction and interpretation is not in issue, 92 C 168
 in suit on guaranty and against one as undisclosed principal, the issue is not on the contract, but on the promise which law implies, 92 C 277
 under allegation of virtual performance of a contract and a denial of it, one can show the real cause of apparently bad workmanship, 93 C 380
 where subcontractor brings action to foreclose lien and general contractor and other subcontractors are parties, the amount of their claims is put in issue as against general contractor though no issue is made between them, 95 C 336
 allegation of incompetence of chauffeur does not permit evidence of his general incompetency, 96 C 663
 failure of complaint to sustain claim of payment by duress, 97 C 131
 claims of law, not involved in the issue, are properly disregarded, 97 C 293
 allegation in complaint to recover property on basis of resulting trust that plaintiff held a bond for a deed, *held* not to make action one on bond, 97 C 293
 in negligence action, stating particular cause of accident does not preclude reliance on *res ipsa loquitur* doctrine, 98 C 628
 what evidence is admissible under allegation of specific acts of negligence; allegations to receive a reasonably comprehensive construction, 99 C 1
 allegation that automobile was not being operated "at the street intersection lawfully" permits proof of violation of rules of road, 100 C 551
 where complaint based on negligence, recovery can be had on no other ground, 104 C 283
 general negligence, or negligence in operation of automobile, in absence of motion, admits proof of any acts within its general purview, 105 C 689
 —as excessive speed or failure to keep proper outlook, 105 C 689
 allegation of assault on certain date ordinarily permits proof of one on or about that date, 106 C 506
 issues not raised by pleadings cannot be adjudicated, 107 C 124
 plaintiff cannot allege one cause of action and recover judgment upon another, 107 C 156
 right of litigant to present evidence upon all issues made by pleadings, 107 C 454
 —particularly where federal question involved and finding on all issues necessary

§ 33 Pleading

to present question to United States Supreme Court, 107 C 454

admission of evidence as to facts not included in specific allegations, not error if within general allegations of complaint and no objection made, 107 C 484

where there is a general allegation of failure to take precautions and evidence is admitted without objection as to failure in particular precaution, jury may consider it, 107 C 681

by statute, trial court may hear and determine issues arising under certain counts before trial of issues raised by other counts, 110 C 24

allegations that automobile operated "wantonly, recklessly and negligently" held sufficient after trial to support verdict for wanton misconduct, 110 C 108

where demurrer to defense of double liability overruled, evidence relevant to it properly admitted, 111 C 383

—court might well have directed amendment to complaint, 114 C 192

complaint based claim on negligence in coming out on street with ladder; held could not recover on proof of negligence in swinging ladder after descending it, 114 C 195

defendant cannot attack appointment of plaintiff administrator on trial where he has made no specific denial of right to sue as such, 115 C 299

question of waiver of liens and estoppel not within issues in mere foreclosure action, 115 C 702

under allegation of complaint, facts might have been proven which would excuse failure of plaintiffs to defend against admission of will when it was offered for probate, on ground of ignorance of the defense, 117 C 565

counsel may by agreement or conduct limit the issues made by the pleadings, and such limitation will be binding throughout the trial, 118 C 403

in this State application of doctrine of *res ipsa loquitur* not precluded where plaintiff alleges specific act of negligence as cause of injury; as allowing window in trolley to become defective so that it fell causing glass to break, 119 C 316

court did not err in regarding question whether there had been a loan or gift to defendant as sole issue and that this issue was within fair scope of pleadings, 122 C 561

in action against single defendant, facts which are admitted by answer are not in issue at trial, 129 C 10

—but where two defendants, admission of one not binding on other and issue should be submitted to jury, 129 C 10

plaintiff's claim of mutual mistake in original conveyance of lot to which it was successor in title not within issues of pleadings, 129 C 20

§ 34. Variance between Pleading and Proof

See also JUDGMENTS § 8

§ 35. —In General

variance in unimportant particulars is no ground of error in equity, 13 C 155

right of plaintiff to vary his proof on the trial, 16 C 367

proof of averments according to their legal effect is sufficient, 17 C 343

is a disagreement between allegation and proof in some legally essential point, 27 C 638

variance in declaration to be tested by demurrer or motion in arrest, 32 C 168

tendency is to abolish refined and subtle rules of variance, 32 C 305

videlicet does not dispense with strict proof of material statement, 35 C 32

if facts are undisputed court passes on question of; if facts are disputed jury to decide under instructions, 47 C 288

law forgives variances between allegations and proof which do not mislead defendant, and does not cause him to omit preparation for defense, 55 C 354

—even though they magnify injury and misstate circumstances, 55 C 354

what variances are immaterial, 68 C 578

immaterial variance disregarded and amendment allowed at any stage of the trial, 70 C 53, 77 C 157, 81 C 669, 83 C 671, 86 C 453

discrepancies in matters not essential, as time, place, quality, quantity, and value immaterial, 74 C 136, 81 C 286

immaterial variance between complaint alleging that one was "mentally weak and incompetent" and finding that he was "weak minded and far below the average in intellect," 75 C 131

variances produced by inartificiality in drawing complaint immaterial, 77 C 663

variance in subordinate facts, where act is pleaded by its legal effect, immaterial, 80 C 456

variance may be remedied by amendment during trial, 82 C 294

variance between allegation and evidence that does not amount to entire failure of proof is matter of amendment, 82 C 343

when a new trial is not a remedy for a variance, 82 C 344

there is no variance if complaint directs defendant's attention to true nature of the action, especially when evidence is received without objection, 83 C 635

though material, court should direct amendment to remedy it, if other party is not misled, 83 C 671

must be a disagreement in some matter essential to charge or claim, 86 C 453, 96 C 487

difference as to terms of a contract proved in general, 86 C 453

disagreement between allegation and proof must be on some matter essential to claim, 87 C 90, 89 C 254

immaterial variance between pleading and proof does not prejudice a party, 87 C 691
judgment non obstante veredicto does not lie for variance, 91 C 249

if contract, recited in full in complaint, is admitted by defendant, and plaintiff fails to deny an allegation in counterclaim that quotes only a part, he can still rely on the omitted part, 93 C 234

no variance if allegations are broad enough to warrant, in absence of objection, admission of all facts found by trial court, 93 C 302

plaintiff's pleadings, especially in contract actions, must fairly apprise defendant of cause of action he intends to prove, 103 C 491

slight variations in contracts due to discrepancies in translations immaterial, 103 C 491

proof admissible under general allegation of negligence, 105 C 689

one party not entitled to benefit of allegations in a coparty's pleadings, 107 C 681

to be available, must be in some manner essential to the charge or claim, 109 C 589

court has departed from strict common-law rule but plaintiff's allegations are still measure of his claim, 114 C 195

under rule permitting amendment "at any stage of the trial" where there is a variance court may permit it at any time before judgment and may suggest or even direct it, 116 C 314

—action discretionary and can be reviewed only when discretion is abused, 116 C 314

variance in complaint and proof waived by failure to object to evidence, 118 C 610

every variance is not fatal, 119 C 514

—where difference is so slight or unimportant that adverse party is not misled, it is treated as immaterial, 119 C 514

—but where so substantial that he is misled to his prejudice it is fatal, 119 C 514

—but court may permit amendment to pleading to conform to proof, 119 C 514

—all immaterial variances disregarded and material variances may be cured at any stage of trial, 119 C 514

—but it is fundamental rule that proof must correspond with allegations, 119 C 514

it was purpose of Practice Act to do away with technicalities in pleading and discourage claims of variance, 119 C 519

in all cases of material variance between allegation and proof an amendment may be permitted at any stage of trial, 120 C 264
to be available must be disagreement between allegations and proof in some matter essential to charge or claim, 121 C 140

where material variance appears on trial, court may suggest or direct amendment to meet it, 124 C 304

§ 36. —Contracts

note signed by one for himself and partner supports action on joint and several note by two, 1 R 119

note for West India goods; proof of note for West India rum and sugar, *held* a fatal variance, 1 R 267

contract signed by J. S. will not support action by J. S. & Company, though purporting to be a contract of J. S. & Company, 2 R 159

declaration need not notice condition in a bond, 2 R 319

—bond of "A, Sheriff," supports declaration on bond of A, 2 R 319

contract to finish will not support a declaration on contract to build, 3 D 315

plaintiff in action *qui tam* on usurious note, must prove note as laid, 4 D 118

—joint and several note for sixty days will not support declaration on note of A for sixty-three days, 4 D 118

acknowledgment of receipt of goods is no proof of promise to account, 2 C 708

action of joint contract is not sustained by proof of contract with one, 3 C 198

—contract must be proved as laid, whatever the breach, 3 C 199

contract made by agent will support declaration on contract described as to its legal effect, 3 C 271

an express promise will not support declaration on an implied promise, 4 C 133

averment to pay in reasonable time; proof to pay on a day certain, *held* fatal, 4 C 133

note "for value received" does not support declaration omitting such words, 4 C 202

variance is fatal if the proof fails to support the consideration alleged, 4 C 265, 32 C 303, 33 C 514, 35 C 31

promise to wife *dum sola* will not support declaration on promise to husband and wife jointly, 5 C 277

promise on condition will not support declaration on promise to pay in reasonable time, 5 C 277

variance is fatal, if absolute promise is averred, and a conditional one is proved, 6 C 93

declaration for goods sold; proof of unauthorized sale by agent *held* to be variance, 6 C 99

§ 36 Pleading

- special contract to pay note; proof of contract to procure note and discount it *held* to be variance, 6 C 100
- special contract must be proved as laid, 9 C 521
- fatal, if positive promise be laid, and an alternative promise be proved, 9 C 521
- so also if whole consideration is not stated, 9 C 521, 32 C 303
- contract set out in its legal effect, and also in full; proof of one different from that set out *held* to be variance, 9 C 521
- note alleged as signed by J. A. A. is not necessarily disproved by note signed by J. S. A., 14 C 129
- variance when fatal as to price and articles sold, 14 C 425
- a contract alleged must be proved as laid, unless entirely impertinent, 15 C 301
- so in tort, where contract is necessarily stated, 15 C 301
- none, if one sued on joint promise, does not plead nonjoinder in abatement, 16 C 449
- warranty; declaration of horse as A's, and proof of joint ownership, *held* immaterial, 19 C 341
- contract to "finish" instruments supports averment of contract to "make" them, 20 C 47
- signing note by a mark is an execution under one's own hand, though his hand be guided by another, 21 C 430
- stipulation excusing performance on terms which law prescribes, need not be laid or proved, 26 C 404
- averment of promise to return and pay on request; proof, to keep account and pay in reasonable time, *held* a fatal variance, 26 C 443
- averment of same consideration as that expressed in writing; *held* no variance to prove a different actual one, 27 C 40
- note payable at "F. and Mechanics Bank" supports averment of note payable at Farmers and Mechanics Bank, 27 C 190
- declaration and proof of warranty, *held* equivalent, 33 C 515
- action against carrier; special contract in bill of lading; greater exactness required in contract actions than in tort, 43 C 339
- what is an immaterial variance in action on insurance policy, 47 C 557
- no variance to declare on a renewal to one only, of two originally insured, as a contract with him alone, 47 C 557
- allegation of warranty that horse was "sound"; proof of warranty that horse "was all right except that he would sometimes shy"; question of variance is for jury, 49 C 463
- contract alleged in foreclosure of mechanics' lien is not material, and plaintiff may prove a contract of different date from that alleged, 51 C 442
- plaintiff failing to prove special count, may recover under common counts for work and labor, etc., 63 C 363
- although there be no count upon a quantum meruit, 63 C 363
- variance *held* material where contract was for delivery of goods for "spring shipment," and evidence was offered of extension of time during whole summer, 69 C 545
- where allegation was that labor was to be performed at agreed price, and proof was that it was for reasonable price, variance immaterial, 70 C 53, 75 C 714
- variance immaterial where, under allegation that loan was secured by forged note, proof showed surrender of claim for return of note, 70 C 151
- variance immaterial where, under complaint for clothes furnished defendant and his minor sons "for their support," proof showed that clothes were furnished on order of defendant for O, and failed to show that they were for support of son, 70 C 433
- where court requires special contract to be written into blank indorsement, proof is limited to this, 73 C 104
- variance immaterial where description of note omitted clause as to payment of taxes, 74 C 198
- variance immaterial as regards date of hiring in action for rent, 75 C 679
- variance *held* immaterial where allegation was that work was to be done at lowest price and proof is made that sum was agreed upon, 78 C 222
- variance immaterial where complaint alleged payment of note and proof was that it was bought, 78 C 310
- proof of contract to deliver in reasonable time does not support allegation to deliver on arrival, 81 C 572
- an allegation that a note was "by the indorsement of defendant transferred to plaintiff" supports a blank indorsement, 81 C 669
- allegation that one was to serve during testator's life and proof of agreement to serve during life and sister's life, *held* not a variance, 82 C 343
- variance between contract set out in complaint and real one is matter of law for court if real agreement is not in dispute, 82 C 344, 349
- allegation in action to recover on promise to indemnify surety on criminal bond that bond was taken by clerk, admits proof that it was taken by one authorized, and was valid, 83 C 686
- variance between allegation of full performance and substantial performance, 84 C 707, 85 C 180
- if complaint is silent as to profits while finding went into the subject with particularity, no variance, 86 C 453

date of alleged oral contract of sale is not ordinarily an essential matter, 87 C 90

—need prove only one memorandum of sale, though others are alleged, 87 C 90

failure to set out number of articles called for it too trifling to be material, 89 C 254

no variance when three persons are alleged to be partners, and one did not become such until after obligation arose, 91 C 249

allegation that note is payable to R attorney or agent; no variance if proved payable to R with other proof of R's agency, 91 C 598

though evidence shows contract price to be \$3750, court must adopt allegation that it was \$3700, 98 C 240

pleading agreement to assume "a third mortgage on which there is an unpaid balance of \$800," not supported by evidence of agreement to assume a \$1330 mortgage to the extent of \$800, 101 C 186

proof of acceptance of nonnegotiable bill of exchange supports allegation that defendant assumed and promised to pay the sum named therein, 102 C 558

allegation that entire contract was assigned is not supported by proof of partial assignment, 103 C 491

allegation that warranty was made by K Company of Detroit not met by proof that it was made by independent corporation, K Company of Waterbury, 117 C 457

where liability of board arose out of agreement to which it became party by implied assent, no variance between proof and allegations that board made that agreement, 121 C 163

where complaint alleged express contract, refusal of the trial court to permit recovery for reasonable value of services under rule of Practice Book sustained where there was no proof thereof, 125 C 10

§ 37. —Negligence and Nuisance

that defendant negligently permitted nuisance to remain, sustains count that he placed it and permitted it to remain, 15 C 235

allegation that plaintiff was driving in buggy is not sustained by proof that he was driving in a sulky, 27 C 637

slight variance as to manner of infliction of injury is immaterial, 27 C 638

allegation of nuisance "in limits of highway" means the practical, not legal limits, 27 C 640

misstatement in complaint for injury to employee; *held* not fatal where purely technical, and involving knowledge of legal effect of contract between employee and third party, 52 C 551

complaint alleged that defendant undertook as a common carrier; bill of lading exempted certain specified injuries none of which

covered the negligence charged; *held* no variance, 61 C 536

—in respect to every injury except those specially excepted defendant was liable as a common carrier, 61 C 539

where complaint alleged furnishing of unsafe appliances, and evidence showed negligence in failing to give warning to leave room during test, variance immaterial, 74 C 46

variance immaterial between allegation of knowledge and proof of facts from which knowledge may be imputed, 76 C 317

immaterial variance between complaint alleging that one was ordered to "hurry and feed faster" and proof of order to "put in another shovelful," "not to take it up in pieces," but to "take it up altogether and shove it in," 81 C 430

allegation that servant had not equal knowledge of defect with master and proof of a complaint and promise to repair constitutes a variance, 82 C 236

allegation that ditch was fifteen feet deep and proof that it was five or nine is immaterial variance, 88 C 17

—allegation of lack of bracing and proof of inadequate bracing immaterial variance, 88 C 17

difference between description of accident in notice and complaint no variance, 91 C 177

under allegation that defendant carelessly drove against plaintiff, proof is admissible of all the details of the injury, 91 C 338, 340

claim of, in highway injury case, *held* of no merit, 98 C 86

defect in sidewalk in notice to city, *held* not to vary from that stated in complaint, 98 C 314

allegations of negligence *held* sufficient to include violation of statutory rules of road, 105 C 663

general allegation of "failure to take necessary precautions" covers failure to furnish flagman to warn of approaching trains, 107 C 681

proof that boy was standing on running board of truck would not constitute fatal variance from allegation that he was riding on it, 115 C 503

complaint alleged plaintiff fell against railing which gave way and proof was that she reached for clothesline and came in contact with railing which gave way; *held* no such variance as to prevent recovery or to justify granting motion in arrest of judgment, 116 C 454

action predicated on nuisance resulting from operation of large concrete mixer; complaint alleged manufacture of cement, whereas it was ingredient used and not product; no material variance, 117 C 244

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proof that plaintiff was driver of car, instead of passenger in it as alleged, not material variance, 120 C 140

particular manner in which plaintiff was sitting on truck when foot was injured by contact with door of coupe being opened not so essential that differences in proof constituted material departure, 129 C 30

—at most there was variance and, as no objection was taken to evidence, no ground for claiming error on appeal, 129 C 30

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any slight mistake in amount, in declaring on judgment, is fatal on plea of nul tiel record, 2 R 90

allegation of title in stranger, under town vote and tax deed, must be proved as laid, 2 R 173

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judgment against "A B, Jr.," will not support declaration of judgment against A B, 2 R 437

allegation of appointment is supported by proof of previous appointment and continuance, 2 D 528

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proof of profits in land to be purchased will not support allegation of profits in land purchased, 4 C 572

money had and received; proof of receipt of note which was unpaid *held* to be variance, 6 C 99

averment of legal judgment on writ legally directed; proof of judgment on writ illegally directed to indifferent person, *held* a variance, 6 C 140

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mere trivial mistake in officer's receipt *held* no variance, 20 C 493

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—"right to have water flow in great abundance" is not descriptive of a specific right, 29 C 202

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debt alleged in equity as due to two mortgagees; proof of note payable to one only; *held* no necessary variance, 35 C 486

strict rules of variance not applied to notice, 37 C 462, 38 C 49

—more limited right of way than that alleged in notice, may be proved, 37 C 462

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—but administrator may amend, 42 C 541

mode in which water was to be furnished; variance *held* immaterial, 47 C 289

in trespass allegation that offense occurred in one place does not generally preclude proof that it occurred in another place, 55 C 368

foreclosure of lien for benefits; several assessments *held* not proved by certificate of joint assessment, 60 C 115

—in such case no valid judgment could be rendered, 60 C 115

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variance immaterial where proof of release of debt was offered under allegation of payment, 77 C 155

date of conversion need not be proved as alleged, 77 C 370

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the fact that a crime need not be proved to have occurred on the exact day charged, does not permit jury to find that it was committed on a day without any evidence to support it, 81 C 98

variance in date of dispossession in ejectment is immaterial, 81 C 702

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allegation of date of erection of an obstruction to a river's flow *held* immaterial, 86 C 609

—defendant has no right to rely thereon; hence prior date may be shown, 86 C 609

expression in a finding intended merely as an approximate location of a fence is construed in harmony with the judgment, notwithstanding a trifling difference, 89 C 359

allegation that defendant did certain acts justified evidence that it was done by a corporation organized by the defendant, 90 C 625

none between allegation that broker obtained a purchaser at a price and finding that he secured one on satisfactory terms, 95 C 448

no variance between claim that A was to leave B \$35,000 by will and complaint that B was to have income of \$2500 which was the estimated income from \$35,000, 96 C 471

immaterial variance where allegation was that defendant's "conspiring together to cheat and defraud" the plaintiff induced others to break into his store, and proof of a conspiracy to commit robbery, 98 C 807

proof of delivery of gift to R for A admissible under allegation of delivery to A, 104 C 18

under allegation of trespass recovery may be had for acts done in excess of license, 104 C 62

allegation of assault on certain date ordinarily permits proof of one on or about that date, 106 C 506

variance of proof from complaint which court noted, and amended complaint *held* not such as to have essentially changed cause of action or issues presented in fraud action, 116 C 314

complaint for foreclosure of mechanic's lien alleged T was contractor whereas he was subcontractor; *held* variance immaterial, 118 C 610

—did not affect identity of cause of action or other essential of claim, 118 C 610

—and was waived by failure to object to evidence of true situation, 118 C 610

where complaint alleged fraudulent conveyance of "money," C received from litigation, to his wife, and evidence, admitted by defendant, showed C's cause of action was assigned to her previously and the money paid her in pursuance of assignment, *held* defendant not misled and no material variance, 119 C 514

—and as plaintiff's claim of law was that assignment was void he might ignore it in his pleading and treat money as C's, and then there would be no variance, 119 C 514

special defense that rights of plaintiff in property had "long since ceased and terminated" supported claim of abandonment; no variance, 121 C 43

variance between allegation that relator was chief deputy commissioner of finance and proof that he was deputy commissioner so immaterial as to be disregarded, 121 C 237

evidence tending to show that plaintiff acquired title to claim at some time previous to assignment recited in complaint, excluded as not within its proper scope, 121 C 343

court did not err in regarding question whether there had been a loan or gift to defendant as sole issue and that this issue was within fair scope of pleadings, 122 C 561

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—ordinarily, time, place, quantity and value not material, 123 C 543

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objection as to variance is too late after default and hearing, 72 C 617, 73 C 182

—as regards discrepancy between complaint and finding, after appeal is taken, 72 C 627

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if jury based verdict on undisputed facts variant from those in complaint, a motion for new trial is not proper remedy, 82 C 344

if case is tried without objection to complaint or evidence, variance between allegations and proof cannot be claimed on appeal, 93 C 302

motion to set aside verdict is not the way to present question of variance, 97 C 492

to avail on appeal objection must be made on trial, 98 C 577

where there is variance a nonsuit is proper, 103 C 491

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proof of facts beyond those alleged waived by failure to object, 107 C 484

too late after trial on merits to raise question that complaint charged one as instigator of malicious prosecution whereas he was only liable as aider and abettor, 108 C 40

between selling price as alleged and as proved, waived by failure to object to admission of the evidence, 109 C 589

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claim of, must be made at time proof is offered; otherwise cannot be urged on appeal, 112 C 381

claim on appeal that trial court erred in admitting testimony of plaintiff's fall because complaint did not allege it, too late when not made at trial, 115 C 650

claim of variance between allegation and proof as to manner in which plaintiff received injury to ankle cannot be made in Supreme Court where not made in court below, 117 C 11

where plaintiff contests case on merits without objection or protest on ground of claim of material variance he cannot take advantage of it on appeal, 120 C 230, 581, 122 C 626

§ 40. Defects, Objections, and Cure or Waiver Thereof

§ 41. —In General

defects of form only are cured by judgment by default, 11 C 587

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plea of matter puis darrein, *held* too late after finding and reservation, 31 C 277

—so also motion to dismiss, 31 C 278

omission to plead pendency of suit in higher court *held* no waiver of plea in higher court of judgment of lower court, 47 C 330

allegation of termination of suit essential in action for malicious prosecution, 52 C 35

—omission may be supplied from averment of answer, 52 C 35

—omission cured by verdict, 52 C 35

questions as to capacity of parties to sue must be raised by the pleadings, 52 C 233

—where not raised, by going to trial on merits, such objection is waived, 52 C 233

Practice Act requires all formal and technical objections to be made known as early as possible, 53 C 43

—where defects such that judgment is liable to be set aside on writ of error, 53 C 43

omission to demur to defects on face of pleadings may be regarded as waiver, 53 C 52

—Supreme Court will consider question not thus raised, where objections are such that judgment is liable to be set aside on writ of error, 53 C 52

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where, after alleging agreement by plaintiff to furnish goods, no allegation of agreement by defendant to accept them is made, in absence of demurrer or objection to evidence, defect disregarded, 81 C 479

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complaint that is imperfect and argumentative is waived by filing general denial and going to trial, 83 C 642

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on denial of defense of trespass one can prove license but this is waived by failure to object to evidence on trial, 91 C 492

jurisdictional defects can be taken advantage of at any time directly or collaterally, 92 C 649

waiver to general statement waived by trial on merits without objection, 93 C 302

voluntarily going to trial on the merits and not moving to set aside verdict or arrest judgment, waives omission of prayer for relief, 93 C 366

where one count was ejectment and other set up facts that justified setting aside deed, failure to pray for that specific relief will be overlooked in absence of any objection, 93 C 367

waiver of any question as to plaintiff's capacity to sue by failing to raise issue by plea and going to trial on the merits, 94 C 85

complaint cannot be attacked, after verdict and judgment, because allegations in it are too general; must be done before issue joined, 94 C 257, 303

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—it is too late after a judgment upon a trial on the merits, 99 C 640

—failure to allege act was done by an agent, how taken advantage of, 99 C 640

going to trial and permitting evidence that “bum,” used in connection with woman, meant she was lewd waives defect in complaint in failing to allege such meaning by innuendo, 99 C 717

plaintiff who pleads to cross-complaint on merits and goes to trial cannot complain of a failure to serve it on a defendant as required by rules of court, 101 C 658

claim that covenant not to engage in business unreasonable requires inquiry into all surrounding circumstances, must be raised on pleadings, not by objection to evidence, 101 C 713

objection to form of counterclaim waived unless made in trial court, 102 C 152

circumstantial defects may be waived by stipulation or failure to object, 104 C 126

defect in obtaining jurisdiction not waived by answering to merits after plea to jurisdiction overruled; but otherwise, where defendant seeks affirmative relief, 104 C 206

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—so also inartificial averment of act to be done in reasonable time, 2 D 218

—so also omission of similiter, 2 D 392

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—aliter, of good title defectively alleged, 1 D 185

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PLEA IN ABATEMENT

See ABATEMENT, PLEA IN

PLEA TO THE JURISDICTION

See ABATEMENT, PLEA IN; DOCKET § 2; JURISDICTION

PLEDGE

§ 1. IN GENERAL

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3. OPERATION AND EFFECT; POWERS AND DUTIES AS TO PLEDGE

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§ 1 Pledge

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pledgee, who proceeds with reasonable diligence to realize on pledge and accounts to debtor for proceeds, is not guilty of conversion, 90 C 41

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notes pledged as collateral can be enforced only to extent of debt, 91 C 553

contract for purchase of instalment contracts with provisions for repurchase and payment of interest is a pledge, 93 C 129

—right as to instalments collected by trustee in bankruptcy of pledgor, 93 C 129

—effect of transactions being ultra vires as to pledgee, 93 C 129

—notice to debtor, how far necessary to perfect rights, 93 C 129

situation of mortgagee in this case *held* not analogous to that of pledgee who is required to give notice to his pledgor to defend, 93 C 491

§ 3 Pledge

assignment of debt carries collateral with it, 94 C 211
equity in pledged stock can be reached by attachment, 95 C 713
corporation may pledge its own bonds and for less than face value, 97 C 584
—pledgee may sell bonds as it could any pledge, 97 C 584
—holder may enforce them for face value regardless of amount he paid, 97 C 584
right of loanor to pursue remedies to recover money loaned on collateral, 103 C 380
—illegality of contract as to collateral will not prevent recovery of loan, 103 C 380
—in action on loan, offer to return collateral need not be pleaded, 103 C 388
payments made are to be applied on debt secured, 105 C 616
—no more can be collected on security than amount of that debt, 105 C 616
—application of rule where mortgage is given on crops and later these are by agreement delivered to selling association and order on proceeds is given creditor, 105 C 616
damage for conversion of note held as collateral security, 107 C 574
—ordinarily full damage recoverable, but as against pledgor or one in privity with him only actual damage, i. e., amount of debt is recoverable, 107 C 574
rights of beneficiary in life insurance policy which has been assigned as collateral security for loan, 120 C 306
in case of pledge of mortgage, pledgee can ordinarily retain only sum sufficient to repay him together with expenditures for caring for property, 121 C 253
—if he recovers more he will hold surplus as trustee for parties entitled thereto, 121 C 253
—assignee has defeasible title which ends on payment of debt, 121 C 257
—but in present case effect of an unappealed judgment of Superior Court was to vest property of the mortgage in assignee, and as it could not be attacked collaterally, assignee could foreclose, 121 C 253
securities held by bank as collateral for loan of one who dies belong to estate but are subject to right of bank to use them for payment of debt, 122 C 71
plaintiff bank did not act inequitably in selling stock held as collateral for loan so as to preclude it from resorting to equity in foreclosing mortgage given as additional collateral, 122 C 419
—nor was plaintiff estopped from foreclosing by its conduct and representations concerning conversion of collateral, 122 C 419

default in payment of note for which shares of stock were given as collateral does not give plaintiff ownership, 123 C 631
—where pledgee does not have stock transferred to him he is not entitled to notice of stockholders' meeting, 123 C 631
rights of pledgor of stock to claim conversion where pledgee takes over stock, 124 C 201
pledgee of shares has right to have stock transferred on books of company and doing so is no conversion, 124 C 211
nominal transfer of pledge which does not put property beyond control of pledgee does not amount to conversion, 124 C 212
if pledgee without authority wrongfully buys in the pledged property the pledgor may repudiate transaction, 124 C 213

§ 4. Payment of Debt and Return of Property; Redemption

right to redeem, where pledgee dies, is barred unless claim is exhibited, 2 R 142
right of surety to collateral security on payment, 15 C 380
pledge or fund as collateral security is to remain for the redemption of the debt, 15 C 380
right of subrogation is not to be exercised against creditor's essential interests, 15 C 446
pledgors of stocks to secure margins are entitled to redeem, 63 C 200
—an assignment in insolvency does not interfere with the exercise of this right, 63 C 200
—pledgors must be able to reasonably identify their securities, 63 C 200, 225
—identification of certificate as the precise one bought, or actually carried to fulfill an order to buy, is sufficient, 63 C 225
—where a block of stock sufficient to meet demands of all customers of that stock was carried, each may redeem his amount of shares, 63 C 200
—where there is a shortage of any kind of stock, presumption is that stocks on hand were being carried for outside customers rather than for firm, 63 C 200
—if stock is insufficient, customers can redeem only a ratable proportion, 63 C 200
burdens upon margin stocks in hands of subpledgees over pledgor's balances due, to be averaged among holdings of all margin customers of that broker, including broker, 63 C 200, 230
a pledgor depositing his own stocks as security for margins, without giving authority to rehypothecate, is entitled to priority in redeeming over other customers whose stocks have been hypothecated with his, 63 C 200

subrogation of guarantor, 93 C 119
where collateral to bonds was deposited under an agreement that it could be withdrawn as the bonds were paid, and the company issuing the bonds went into liquidation after certain of the bonds were paid but before the collateral was withdrawn, suit could be brought to redeem pledged property, 94 C 94
satisfaction of debt discharges mortgage given as collateral security, 105 C 616

party may sue upon agreement to indemnify him from loss in disregard of deed given him as security, 122 C 20
—in equity such deed treated as mortgage, 122 C 26
—upon satisfaction of obligation secured defendants would be entitled to reconveyance of land, 122 C 27
where debt had been satisfied debtor can require restoration to him of any property held by creditor as security, 125 C 285

POLICE OFFICERS

See ARREST ; PENSIONS ; PUBLIC OFFICERS § 13 ; SEARCH AND SEIZURE

POLICE POWER

See CONSTITUTIONAL LAW § 7

PONDS

See WATERS § 6

POOR DEBTORS

See also EXECUTION § 5 ; PRISONS ; PUBLIC OFFICERS § 9

money for support of prisoners who have taken poor debtor's oath is to be lodged with jailer, 1 R 117

prisoner who has taken poor debtor's oath must remain reasonable time after money for his support is expended, 1 R 285, 352
immediate departure of debtor after taking poor debtor's oath is a voluntary escape for which he and sheriff are liable, 2 R 281, 3 C 423

what citation by poor debtor to creditors is sufficient, 2 D 562

—poor debtor cannot be detained after taking oath, unless money is left for his support, 2 D 562

escape after second taking of oath; original sum for support unexpended, 4 D 50

administration of poor debtor's oath is a ministerial act, 3 C 109

poor debtor is entitled to money left with jailer for his support, 3 C 500

justice may administer oath on new application, after refusal by court of review, 5 C 204

falsely and corruptly taking poor debtor's oath is perjury, 11 C 408

creditor bound to support imprisoned debtor, 49 C 87

—expenses thereof are recoverable by creditor on execution under statute, 49 C 90

a certificate of justice reciting requirements essential to give him jurisdiction to administer oath relieves jailer from liability if he releases debtor on it, 91 C 510

—it should recite all the jurisdictional facts and the obligation to issue it is implied, 91 C 510

administering the oath is a ministerial act; inquiring into the matter and determining it is judicial, 91 C 510

unsatisfied judgment of fraud against debtor is material on his application for oath; not conclusive why oath should not be administered, 93 C 271

fact that debtor had been adjudicated bankrupt within six months of application is relevant, 93 C 271

an adjudication of bankruptcy is presumably accompanied with the usual incidents and consequences, 93 C 271

—burden of showing their absence is on the opposite party, 93 C 271

while actual administration of oath is ministerial act, determination that "no sufficient reason is shown to contrary" involves exercise of a judicial function, 129 C 545

—party obtaining the judgment is the "adverse party" entitled to notice and, if he is inhabitant of State, notice to his attorney is insufficient, 129 C 545

—notice of hearing February 20th served on plaintiff's attorneys the 15th and on plaintiff the 17th did not comply with statute requiring notice to be served at least four days inclusive before hearing on adverse party, if inhabitant of State, otherwise his attorney, 129 C 546

§ 1 Possession

POSSESSION

§ 1. OF PERSONAL PROPERTY 2. OF REAL PROPERTY

See also ADVERSE POSSESSION; EJECTMENT § 4; OUSTER; SALES § 17

§ 1. Of Personal Property

constructive possession in receiptor putting goods in hands of another, 3 C 164

delivery of possession is essence of a sale, 5 C 199

—of mortgage of chattels, 5 C 199

retention of possession by mortgagor of chattels is fraudulent; so also retention by vendor, 5 C 200

sale of mortgagor of chattels in possession to bona fide purchaser vests title, 5 C 201

personal property regarded as in possession of general owner, if not in actual possession of anyone, 7 C 274

delivery essential to validity of a gift, 13 C 95

delivery is essence of contract of pledge, 16 C 287

retaking by force, of goods in possession of wrongdoer, is lawful, 18 C 16

possession of plaintiff sufficient as against wrongdoer, when, 18 C 234

possession of personalty is prima facie evidence of ownership, 18 C 309

—acts and declarations of such possessor, when admissible, 18 C 309

every owner of personal property is presumed to have possession, 21 C 597

possession of lost property is, in law, in the owner, 22 C 158

mortgage of chattels; retention; delivery to partnership, 24 C 314

one may have exclusive possession of chattel on land occupied in common with another, 24 C 555

possession is how far a badge of ownership, 57 C 386

—creditor cannot always assume that debtor is owner of all personal property in his possession, 57 C 386

—must make due inquiry, 57 C 386

any possession is legal against one without title, 65 C 525

—title of third party may be shown in defense of possession, 65 C 528

title draws possession to it, when no one is in actual possession, 65 C 527

possession of one joint owner of personal property as that of all, 73 C 638, 79 C 294

possession of note as evidence of ownership, 76 C 132

possession of personal property as evidence of ownership, 79 C 22

right of possession will support action of trover, 79 C 342

possession of agent is that of principal; custody distinguished, 79 C 718

under statute, possession of dead bodies extends to subsequent removals and interments, 81 C 598

there is no breach of possession in embezzlement, 83 C 449

possession of personal property by vendor after sale renders it invalid as against his creditors and bona fide purchasers who obtain possession, 86 C 372

—possession is not changed by mere words, 86 C 372

receiver's right to possession dates from his appointment, not from commencement of action, 87 C 369

purchaser of a pile of lumber must do more than attach his business card, to convey notice of his possession to the world, 89 C 440

attempt of one to sell lumber may be notice of his possession to those he deals with, but not to the world at large, 89 C 440

omission to take all possible steps to notify the world at large of his possession, rather than failure to remove the article, justifies inference of no change of possession, 89 C 440

acts of ownership are not material on question of possession unless they are so manifest and open as to indicate to the world at large a change of possession, 89 C 440

constructive possession of mislaid property is in the owner; actual custody in the finder, 89 C 564

life beneficiary of a trust has no present right to possession as an absolute estate, 90 C 64

what is and is not sufficient possession of grain in a warehouse by pledgee as against pledgor's creditors, 90 C 416

possession is essential to validity of a pledge, 91 C 57

buyer cannot have possession until seller is paid if the seller reserves the *jus disponendi*, 92 C 420

retention of possession by mortgagor or vendor of personal property does not affect rights of original parties, 95 C 172

transfer of possession, without intent to consummate transfer of property, is not an offense under statute, 96 C 102

in action for conversion, right to immediate possession must be alleged and proven, 96 C 233

joint possession, by several accused, of instruments of housebreaking, 97 C 259
bona fide purchase of personal property by one who takes its actual possession ordinarily carries right of possession, 99 C 583

—one having general property in chattel without possession may bring trover for the taking of it by a stranger, 99 C 583

§ 2. Of Real Property

possession of one holding under legal proprietor is possession of such proprietor, 9 C 429

—of mortgagor, is possession of mortgagee, 9 C 429

owner of land is presumed to be in possession where nothing to contrary is shown, 24 C 21

possession is the gist of action for flowing back water, 24 C 21

owner is not necessarily out of possession by a letting from year to year, to depasture, 24 C 21

possession of former owner eight years before admissible for defendant in action of forcible entry and detainer, 33 C 103

—presumed that party in possession continued until transfer, 33 C 104

insolvent's retention of possession, after settlement, of realty assigned renders crops raised thereon subject to attachment as his property, 39 C 319

—attachment by creditor on after-accruing claim held good against vendee failing to record deed, 39 C 319

when commercial correspondent advances purchase money and takes possession of property, he becomes the owner, whether his possession be actual or symbolical, 57 C 378

there may be constructive possession of wild uncultivated lands, 58 C 182

erection of shed subsequently abandoned not inconsistent with continued possession by another of land on which it stands, 64 C 475

possession under deed of trustee with power to sell gives color of title which will prevail against one not having such color of title, 64 C 475

possession of tidewater flats shown by driving piles, etc., 69 C 24

possession of land from erection and maintenance of a wall thereon, 71 C 254

possession as necessary to prove ownership in connection with paper title to real estate, 71 C 555

title draws possession to it, when no one is in actual possession, 71 C 573, 78 C 116, 82 C 653

demand for possession under sale, 73 C 118

possession of real estate as evidence of ownership; presumption, 75 C 522

projection of eaves over land not ouster of possession, 75 C 663

possession of life tenant not adverse to remainderman, 76 C 595

deeds, maps, etc., as defining limits of possession, 78 C 107

proof of possession will support action for trespass, 80 C 338, 89 C 536 and see TRESPASS

widow has immediate possession of land devised to her during widowhood, 81 C 218

actual possession unnecessary to establish title if documentary or other evidence exists, 81 C 218

executor may hold possession of real estate as a cotenant, 81 C 442

possession of real estate presumed to follow title, 81 C 442

possession presumed to follow title to real estate unless contrary appears, 81 C 442

possession must be surrendered, to question landlord's title, 81 C 702

mere taking of gravel from land does not show possession of it, 82 C 653

owner of legal title is constructively in possession of land, 82 C 653

ancient possession is evidenced by ancient deeds, 83 C 386

administrator has only statutory possession of real estate; heir has actual possession, 84 C 570

title and possession is ordinarily determined at law; equity does not interfere, 85 C 159

in issue involving title and possession, one is entitled to a jury trial, 85 C 159

actual possession necessary in action for forcible entry and detainer, not enough that one resided on the land, 85 C 203

in trespass, defendant can prove possession in a third party under whom he acted, 85 C 203

allegation that "one resides and makes his home" in a building not good allegation of possession, 85 C 204

right of real owner to gain possession of his building, 85 C 204

devisee under specific devise has sufficient possession to maintain an action for a reconveyance from one who obtained a deed from the testator by undue influence, 85 C 567

in trespass plaintiff must prove actual or constructive possession, 86 C 537, 90 C 576

covenants against incumbrances affect only the possession of land, 87 C 164

chain of ancient deeds as proving, 88 C 520

conveyance of land to a friend who at once conveyed it back does not change possession to vitiate insurance, 89 C 35

§ 2 Possession

- quitclaim deed from cotenant is as good as a warranty in giving notice of grantee's entry and possession thereunder, 95 C 619
- plaintiff can recover in trespass by proving actual exclusive possession or constructive possession by proof of title and no actual exclusive possession in another, 102 C 84
- no constructive possession of lands not within boundaries of deed under which party claims, 112 C 166
- all circumstances to be considered in determining whether continued possession after change of ownership is under contract or a mere holding over; labor and expenditures on property, 112 C 427
- presumption is that possession of real estate by husband and wife is possession of one having title; same principle applicable to possession under contract of sale, 112 C 427
- mortgagee gets legal title to property and in absence of agreement or other circumstances debarring him is entitled to possession, 117 C 218
- may assert right against mortgagor in possession by action of ejectment; no notice or demand necessary as condition precedent to bringing action, 117 C 218
- has immediate right of entry which he may assert without bringing action, 117 C 218
- limitation of right of entry is that it cannot be made or possession retained in vio-

- lation of statutes against forcible entry and detainer, 117 C 218
- mere paper chain of title does not establish ownership unless possession is shown, though title satisfactorily established may draw with it possession in absence of evidence to contrary, 118 C 137
- ancient deeds, more than thirty years old, admissible to prove possession, 118 C 137
- deeds less than thirty years old at time of trial *held* not sufficient to establish ownership, 118 C 137
- and there was no evidence of possession in plaintiff or his predecessors in title, 118 C 137
- while title to particular tract draws possession with it, general possession of tract will not avail as regards any particular piece of land unless it is shown to have been a part of that tract, 119 C 282
- question whether taking possession by foreclosing plaintiff is essential to appropriation of property to the debt, 120 C 16
- possession not material with respect to passing or existence of either legal or equitable title of land; nor as to incidents of equitable title (dis.), 120 C 404
- though land not much used by anyone, plaintiff within rule that it was in constructive possession by virtue of title and absence of actual possession by another, 124 C 386
- this possession sufficient to support action of trespass, 124 C 386

POWERS

See also EXECUTORS AND ADMINISTRATORS § 9; TRUSTS §§ 9, 16;
WILLS § 48

- power, conferred on several for private purposes, should be executed by all, 4 C 53, 18 C 197
- power, if of public nature, is joint or several, 4 C 53, 18 C 197
- majority may execute if all notified, 4 C 53, 18 C 197, 22 C 189, 25 C 17
- submission to arbitration is a power for private purposes, 4 C 54
- naked power to collect note and apply proceeds is revocable at pleasure, 4 C 123
- naked power is revocable at pleasure, 6 C 562
- a power coupled with an interest is generally irrevocable, 6 C 562
- interest must be in the thing itself, 6 C 563
- each kind of power defined, 6 C 562
- power to sell and convey is a naked power, 6 C 565
- coupled with an interest, is revocable so far as relating to prosecution of suits in name of principal, 6 C 565
- indefinite power to lease is a power to renew such lease, 9 C 427
- powers of board appointed for particular act are exhausted by one performance, 13 C 410
- aliter, if first exercise is void, 13 C 411
- principles of English Statute of Uses are part of our common law, 16 C 474, 69 C 542
- general language of power limited to subject matter, 17 C 490
- how construed when different purposes are aimed at, 20 C 169
- unanimous action by public agents is not invalid because one is disqualified, 25 C 186
- power to subscribe stock implies what, 29 C 151
- power once exercised is exhausted, 67 C 220
- defined; to be strictly exercised; powers reserved in deed may enable grantor to defeat deed; power to mortgage, 69 C 542

mere naked power to establish a trust *inter vivos* in personal property for benefit of a third party must be exercised before donor's death or else it is revoked, 82 C 504

gift by means of a note delivered to donor's own agent to be used by him is creation of a power to establish a trust, not a power coupled with a trust, 82 C 507

power coupled with an interest survives death of donor when the interest is in the thing itself that is the subject of the power, 82 C 508

mere naked power conferred on two or more, uncoupled with a trust, must be executed by all the donees of the power; if one dies, survivor cannot exercise it, 84 C 494

method prescribed in instrument must be strictly followed in exercise of power; if two can fill a vacancy, but only one is living, he cannot act, 84 C 494

donor of power can direct how vacancy shall be filled, 84 C 499

in fraternal benefit society, mere power of appointment of beneficiary is not asset in donee of power and passes no title to or interest in property conveyed, 87 C 648

—if unexercised by donee prior to his death, becomes wholly inoperative, 87 C 648

—unless charter of contract of membership provide otherwise, 87 C 645

delegation of power by board of aldermen as to ministerial, administrative or executive matters, 95 C 647

power conferred on two or more by individuals to decide private matter requires concurrence of all, 107 C 272

—but when for public purposes, particularly if of judicial nature, majority suffices, 107 C 272

—appraisers of mortgaged property, 107 C 272

power of revocation consistent with creation of valid trust, 110 C 22

—does not make disposition testamentary or prevent immediate vesting, 110 C 22

a power of attorney to F to convey property is neither part performance nor sufficient memorandum of alleged oral agreement by owner of property to give it to attorney, 114 C 539

—in such case power is not one coupled with an interest, 114 C 539

—power revoked by death of owner, 114 C 543

letters giving broker authority to pledge, sell or otherwise dispose of securities are evidence of power given him rather than transfer of title to him, 115 C 540

member of mutual benefit association has no property rights in fund but only a power of appointing beneficiary, 117 C 53

right reserved in insurance policy to change beneficiary is in nature of power of appointment, 120 C 633

authority of administrative body acting under grant of power to make rules to enforce and carry out intent of statute is limited to making reasonable rules and regulations within scope of power granted, 123 C 32

appointees under power derive title from will of original testator and title never vests in person exercising power, 124 C 417

where life tenant had power of appointment at her death, appointees entitled to recover on bond given by her as trustee, 124 C 418

—equitable doctrine by which creditors of person having power of appointment are preferred over appointees, not applicable in situation as regards corporate surety, 124 C 418

to constitute valid exercise of a power, intention must be clear, 127 C 359

—in case of written instrument existence of such intention presents question of law, 127 C 359

recitation in will of policeman that as his wife would receive a monthly payment from widows' pension fund, she would not need material sum from estate, did not vest in wife rights to receive benefits from this fund under terms of charter, but was only expression of mistaken belief, 127 C 359

under New York law, mortgagee of personal property becomes absolute owner after default, subject to right of redemption; when he sells property under power of sale he sells it as own not as agent of mortgagor and right to sell is not in nature of power of attorney, 128 C 254

PRACTICE ACT

See PLEADING § 1

PREFERENCE

See BANKRUPTCY § 3; FRAUDULENT CONVEYANCES § 2

Prescription

PRESCRIPTION

See ADVERSE POSSESSION; EASEMENTS § 4

PRESUMPTIONS

See EVIDENCE § 8; STATUTES § 6; WILLS § 15

PRINCIPAL AND SURETY

See SURETYSHIP

PRISONS

§ 1. IN GENERAL 2. ESCAPE

See also CRIMINAL LAW AND PROCEDURE § 19; POOR DEBTORS

§ 1. In General

sheriff has no right to take bond that his prisoner shall abide in jail until he pays jailer for board, 1 R 158

United States marshal for Connecticut may be imprisoned in jails of this State, 2 D 300
master of workhouse to furnish food to inmates; no implied promise to pay master for necessities, 3 C 506

town where jail located is not liable for support of transient committed to jail for non-payment of fine to justice of peace of another town, 5 C 185

town where conviction of noninhabitant was had before justice of peace not liable for support of prisoner, 7 C 528

county commissioners have no power to take from sheriff supervision and control of workhouse, under guise of appointing an assistant to deputy sheriff, 25 C 103

charge and custody of jail given to sheriff by statute, 25 C 111

mandamus lies to restore sheriff to control of jail, 25 C 111

sheriff may remove keeper of workhouse, 25 C 112

creditor bound to support imprisoned debtor in jail, 49 C 87

—expenses thereof are recoverable by creditor on execution, 49 C 90

“state prison or penitentiary” in Indeterminate Sentence Act not intended to include federal penitentiary at Atlanta, 110 C 298

statute permitting directors of reformatory to transfer to state prison inmate who refuses to obey regulations or appears to be incorrigible, valid, 116 C 136

determination of whether inmate is entitled to commutation or diminution of sentence is administrative function which may

properly be reposed in officers of prison, 116 C 136

where inmate of reformatory on parol commits another offense and is sentenced to state prison, upon discharge he is again subject to control of officers of reformatory and to transfer to prison, 116 C 136

—and instructions to state prison to hold him on his discharge, as inmate of reformatory transferred to it, would be valid, 116 C 136

vote of directors of reformatory that prisoner serving sentence at state prison “be transferred” to state prison to serve balance of reformatory sentence, to take effect after expiration of sentence he was then serving there *held* valid, 116 C 136

—vote was authorization of future transfer and within power of directors, 116 C 136

where inmate of reformatory is transferred to state prison the maximum term of his sentence is not affected, 116 C 136

incidents of sentence to reformatory are effective after transfer of inmate to prison; he also becomes subject to conditions incident to discipline of prison, such as commutation of sentence, 116 C 136

in case of inmate of reformatory transferred to prison, and also serving state prison sentence, the two sentences should be regarded separately in computing time earned for good behavior, 116 C 136

prisoner held at state prison after serving sentence there, for completion of reformatory sentence, *held* not entitled to release under facts, 116 C 136

§ 2. Escape

officer not liable for escape if sufficient bail is taken which afterwards fails, 1 R 54

- sheriff is not liable where debtor is released by General Assembly, 1 R 72
- going out of prison limits by one on bonds is a negligent escape, 1 R 107, 127, 2 R 175, 336
- sheriff may recapture prisoner, 2 R 175, 336
- nominal damages only recoverable if remedy against sheriff is barred, 1 R 128, 2 R 336, 25 C 410
- judgment should be for special damage to the creditor, not for his debt, 1 R 126, 155, 278, 357, 505
- actual damages only recoverable of county for escape by insufficiency of jail, 1 R 126, 2 R 24
- sheriff not obliged to retake escaped prisoner; may look to bond, 1 R 128
- sheriff not liable for escape if court rendering judgment by which prisoner was jailed had no jurisdiction, 1 R 288
- debtor may be retaken after return of writ, 1 R 388
- county is liable unless a clear and certain remedy against another is shown, 1 R 450
- county not liable for escape from a sufficient jail where external force is used, 2 R 196
- escape by creditor's procurement subjects sheriff to nominal damages only, 2 R 337
- court may award whole debt and interest as damages for negligent escape after commitment for want of bail, 2 D 198
- liability of sheriff for escape of debtor from jail placed upon grounds of public policy, 5 D 37
- escape not justified by refusal of officer to accept sum not including his fees, 5 D 249
- where jail limits enlarged by County Court order, sheriff not liable for escape of prisoner beyond usual jail limits, 5 D 506
- order of County Court fixing limits of prison and making line of street one of boundaries construed to mean practical line, not air line specified in laying out, 2 C 382
- sheriff is excused by a recapture or by voluntary return before action, 2 C 475
- sheriff not bound to receive prisoner on his return, 2 C 475
- escape of poor debtor by consent of sheriff held a voluntary escape, 3 C 425
- rule of damages in such case, 3 C 426
- escape by consent of jailer; sheriff cannot recover on the bond, 3 C 429
- escape from prison is an offense at common law, 7 C 387
- punishment for peaceable escape not to exceed term for which person was imprisoned, 7 C 387
- person confined in jail on void warrant may lawfully escape; what force he may use, 7 C 455
- escape from prison limits is breach of bond not to escape from prison, 8 C 69
- sheriff not bound to receive prisoner after an escape, 8 C 70
- rule of damages for escape by sheriff against surety; no demand on surety required before suit, 8 C 70
- justification; writing *held* not to be a license to depart, 11 C 280
- escape during term of confinement for costs is criminal, 16 C 50
- intent is necessary to constitute criminal escape; jailer's license is no justification or excuse for such escape, 16 C 51
- Act, 1842, de imprisonment for debt, freed those detained at its passage, 16 C 222
- such departure is no breach of bond, 16 C 222
- such prisoner not required to resort to habeas corpus, 16 C 222
- employment of prisoner in and about jail does not constitute an escape, 25 C 423
- after voluntary escape there can be no return so as to reinvest sheriff with lawful custody, 25 C 423
- prison bonds do not change with a change of highway, 25 C 425
- admissions of debtor are admissible against sheriff to show cause of action in original suit, whether made before or after escape from officer, 25 C 506
- if writ in original suit was void, it would avail as a defense to officer; aliter, if only erroneous, 25 C 508
- duty of officer after arresting debtor on mesne process, 25 C 508
- sureties on bail bond are not entitled to notice of principal's default to fix liability, 37 C 71
- debtor allowed at his request to go with jailer to transact business cannot claim it as an escape, 37 C 84
- especially where it does not appear that place is outside prison limits, 37 C 85
- in action on bail bond for escape, debtor cannot justify by showing illegal requirements by sheriff, 37 C 85
- escape from liberties of prison; one paroled and so escaping, a fugitive from justice, 68 C 450
- intent of jail liberties bond is that, while liberties of prisoner are enlarged, he is retained in jail limits until discharged, 116 C 22
- indemnity of the bond is to cover liability of sheriff if he escapes, 116 C 22
- and a going beyond the limits is an escape even if followed by a return to custody, 116 C 22
- a person is in prison in legal contemplation when within the liberties of the prison, 116 C 22
- an escape from the liberties is an escape from the prison, 116 C 22

Privileged Communications

PRIVILEGED COMMUNICATIONS

See EVIDENCE § 99

PRIVITY OF TITLE

See TITLE AND OWNERSHIP

PROBABLE CAUSE

See FALSE ARREST OR IMPRISONMENT; JUSTICES OF THE PEACE;
MALICIOUS PROSECUTION § 1

PROBATE COURT

- § 1. IN GENERAL; JURISDICTION GENERALLY
- 2. CONSTRUCTION OF WILL; DISTRIBUTION
- 3. CLAIMS
- 4. SALES
- 5. MISCELLANEOUS JURISDICTION AND POWERS
- 6. EFFECT AND CONCLUSIVENESS OF DECREES; MODIFICATION; RECORDS
- 7. APPEALS FROM PROBATE
- 8. —In General; When Appeal Lies
- 9. —Who May Appeal; Interest
- 10. —Powers of Superior Court on Appeal
- 11. —Procedure

See also COMMISSIONERS OF ESTATES; CONSERVATORS; ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; RESIDENCE AND DOMICIL; TRUSTS; WILLS § 7

§ 1. In General; Jurisdiction Generally

Probate Court has power to ascertain facts requisite for exercise of its jurisdiction; cannot be collaterally attacked, 2 C 388

settlement of all estates both real and personal appertains to Probate Court within whose jurisdiction the estate is, 7 C 23, 307, 8 C 281, 31 C 279, 41 C 551

has chancery powers on all subjects within its jurisdiction, 8 C 281, 35 C 123, 41 C 551

has no jurisdiction over real estate of deceased person, 9 C 14

—aliter, if debts and charges exceed personalty, 9 C 14

court of chancery proper court to enforce trust; Probate Court unable to grant relief, 10 C 121

judge not disqualified because he is uncle of husband of one of the heirs, 17 C 542

judge disqualified to appoint commissioners if he is taxpayer of town interested, 19 C 584

charge of judge for finding *held* illegal, 21 C 551

a judge who, as administrator of another estate, is a creditor of insolvent debtor, is thereby disqualified to act on insolvent estate, 26 C 15

jurisdiction of Probate Court is limited and special, 26 C 286, 31 C 381, 34 C 446

clerk once appointed continues in office how long; is clerk of the court, not of the judge, 26 C 416

judge not disqualified in insolvency proceedings, for having been retained as counsel, if no objection is made at the time, 26 C 544

judge who was also a selectman is disqualified to appoint conservator, 28 C 267

has only such equity powers as are incidental and necessary to settlement of estate, 37 C 185

law permitting judge of probate to call in assistance has existed in some form since 1716, 38 C 479

where no appeal taken to next term of Superior Court from decree of probate judge who was disqualified under statute, decree is valid, 39 C 254

strict rules of pleading are not applicable to probate petition, 40 C 288

—sufficient if necessary averments are substantially found by fair intendment, 40 C 288

person under conservator may with his implied consent gain a new domicile, and latter Probate Court has jurisdiction of the settlement of his estate, 48 C 165

jurisdiction not affected by acting on copy of will, 48 C 166

only in emergency will equity interfere in settlement of estate, 49 C 580

decree of court of competent jurisdiction of another State finding domicile of testator to have been therein conclusive here, 50 C 330

judge certifying copies acts as his own clerk, 52 C 216

cannot administer equities except where directly involved in the matter on which it is acting, 53 C 24

a court of chancery has authority to protect remainder interests, 53 C 169

—not affected by statute which gives Probate Court power to require security, 53 C 169

testator's domicile, rather than residence of executor, determines jurisdiction, 58 C 223

—duty of such court to keep property in its control until distribution, 58 C 223

statute de citing in of judge of adjoining district by clerk, *held* directory only, 59 C 354

—if cited in by the judge instead of clerk action by judge so cited *held* legal, 59 C 354

does not have any general equity jurisdiction, 59 C 577

—to what extent it has equity power, 59 C 577

jurisdiction of Probate Court is limited and special; has no powers except those conferred by statute, expressly or by implication, 61 C 441

—statute de intervention of creditors in insolvency, 61 C 441

where Probate Court has possession of the res and proceedings are in rem all parties in interest have constructive notice and are bound, 67 C 18

will cannot confer jurisdiction on, 69 C 702

mutual distribution does not end power of court over estate, 72 C 555

powers determined by statute; reopening judgment approving will after estate is settled, 76 C 412

personal property is subject to law of owner's domicile, 76 C 617, 77 C 644

failure to give notice not jurisdictional defect, 77 C 77, 81 C 688

can recognize decisions of Probate Court of testator's domicile, 81 C 681

one who has no interest in a probate matter is not entitled to notice, 84 C 324

by giving of notice in a probate hearing Court of Probate does not thereby acquire such jurisdiction as to warrant a writ of prohibition, 86 C 351

court must find if decedent's domicile was in its jurisdiction; this must appear of record, 86 C 351

existence of jurisdictional facts not assumed, 86 C 351

Probate Court can investigate question of testator's domicile, 86 C 351

writ of prohibition will not be granted to prevent probating a will on ground that decedent was a nonresident, 86 C 351

three days' notice of Probate Court on estate of one not heard of for seven years may be proper, 88 C 423

disbarment of attorney, who happens to be judge of probate, does not affect his judicial status, 88 C 447

judge should not collect fees as attorney in an estate before him, 88 C 447

service of garnishee process on judge is not sufficient to attach debt in absence of direction to serve foreign executor or administrator, 88 C 606

in some cases service on nonresident executor or administrator may be made on judge of probate, 88 C 606

probate record is best evidence of its contents, 88 C 656

—clerk cannot be asked whether there was another paper and whether it was received as a distribution, 88 C 656

lack of jurisdiction of Probate Court not presumed, 89 C 422

one invoking jurisdiction for commitment of inebriates is estopped from denying it, 90 C 529

has only such powers express or implied as are conferred by statute, 90 C 530

—may modify or revoke its ex parte decrees before appeal, 90 C 530

—cannot set aside final decree after notice and hearing, 90 C 530

son, not objecting to probate of father's will, but claiming that family practised fraud in getting property; only remedy is in equity on the ground that fraud was practised upon the Court of Probate, 91 C 515

jurisdiction is entirely statutory; has only incidental powers necessary for its duties, 92 C 25, 93 C 402

judge not liable for an action if he has jurisdiction, even if he issues orders in excess of his powers, 93 C 550

treating attorney appointed at earlier stage of proceedings as guardian ad litem is equivalent to appointment for proceeding in question, 93 C 590

§ 1 Probate Court

- Probate Court alone has jurisdiction to determine if estate is insolvent, 94 C 526
- laws providing for method of notice construed, 96 C 319
- giving public notice sufficient although parties did not have actual notice, 96 C 324, 107 C 284
- has no powers except those expressly granted or necessarily implied, 100 C 201, 107 C 281
- action by cestui que trust in Superior Court not barred by nonpresentation of claim in Probate Court, 104 C 169
- equitable jurisdiction is wholly statutory and concurrent with Superior Court, unless clearly intended to be exclusive, 104 C 169
- equitable jurisdiction limited; where rights of strangers to settlement of the estate are involved, Superior Court is proper tribunal, 105 C 562
- has only incidental equitable powers; application of principle of marshaling assets, 106 C 602
- giving of public notice as defined by statute is sufficient to bind all interested parties, 107 C 281
- hence allegation that such party did not have knowledge of proceedings not equivalent to allegation that proper notice not given, 107 C 281
- written agreement between husband and wife married before April 20, 1877, for mutual abandonment of all rights of either in property of other to be recorded in Probate Court to be effectual, 108 C 722
- all powers of Probate Court come from statute, but it has incidental powers, 110 C 161
- jurisdiction of Probate Court determined by residence of decedent at death; location of estate not material, 115 C 299
- power of court of equity to relieve against decree of Probate Court admitting will where there was fraud, undue influence and ignorance of defense, 117 C 565
- no adequate remedy in Probate Court, which has no general equitable powers and no right to grant new trials, 117 C 565
- is statutory tribunal exercising only such powers as are conferred by statute; has jurisdiction only when facts upon which powers are conditioned exist, 120 C 405
- thus, unless deceased died resident of district, Probate Court is without jurisdiction, 120 C 409
- and unless parent as natural guardian has been removed, it is without jurisdiction to appoint another, 120 C 409
- Superior Court in acting on appeal has same powers and is subject to same limitations, 120 C 405

jurisdiction attached where ancillary administrator found property in district title to which was in deceased, 126 C 439

§ 2. Construction of Will; Distribution

- See also ESTATES OF DECEASED PERSONS § 9
- has no jurisdiction over distribution by appointees of testator, 8 C 409
- as to exhaustion of powers of distributors, 9 C 226
- distribution entirely within jurisdiction of Probate Court; can be set aside only on appeal to Superior Court, 24 C 241
- verbal order of distribution perfected by formal order unappealed from conclusive, 38 C 271
- cannot sell estate of joint devisees because difficult to divide; powers limited to distribution, 41 C 10
- proceedings in Probate Court under unsigned will adopted by heirs as mode of distribution set aside by Superior Court where undue influence, 44 C 327
- duty of Probate Court to make distribution of estates to persons originally interested; immaterial that heir has sold his interest, 53 C 37
- purchasers are strangers to the estate and have no interest in distribution, 53 C 37
- Probate Court cannot try validity of division made by heirs and not perfected under statute, 54 C 224
- where division made by heirs did not comply with statutory requirements, Probate Court can make regular decree ordering distribution, 54 C 224
- court should not of its own motion appoint distributors, after a division by parties, 54 C 228
- after distribution of part of residue to a trustee the Probate Court has no complete jurisdiction, unless the matter is specially brought before it by notice to all parties, 56 C 424
- filing inventory and account by trustee under statute is not sufficient notice, 56 C 424
- the will, not the Probate Court, disposes of remainders after a testamentary trust, 58 C 353
- court may ascertain heirs and distributees of intestate estate only where estate pending for settlement in court in way prescribed by statute, 67 C 442
- in acting on return of distributors, court must take assets as stated in executor's final account; cannot determine validity of claims on estate, 68 C 84
- incidental jurisdiction; to construe will as regards duty to appoint administrator d. b. n., 70 C 364
- to determine beneficiaries, 71 C 122

—to pass on fulfilment of condition of bequest, 67 C 385

power to determine distributees, and effect; where estate is all cash or there is only one distributee, court may order property turned over forthwith, 71 C 128

power to order partial distribution, 73 C 56

court may consider surrounding circumstances to explain will, but not to determine its practicability or wisdom, 74 C 588

duty to distribute intestate estate according to statutes of distribution, 81 C 161

court not concerned with equities between distributees of decedent and strangers arising after death, 82 C 308

a mutual distribution should be received and recorded by court; implies a finding that persons are the legal distributees and is assumed to be correct, 89 C 420

Probate Court has exclusive jurisdiction to determine distributees, 90 C 561

—not re-examinable in Superior Court except on appeal, 90 C 561

must determine who legatees are and pass on validity of legacies as charitable bequests, 90 C 593

conflicting claims under a will are determined by the Probate Court, not by interpleader, 91 C 444

court cannot revoke and modify decree of distribution, 92 C 25

can construe a testamentary trust so far as necessary to enforce its execution; cannot determine its validity or whether it should be terminated, 93 C 402

cannot accept distribution based upon value of land in foreign State as fixed by tax proceedings, 110 C 36

—and where no ancillary administration nor ascertainment of debts and taxes, 110 C 36

whether guardian can compromise, and Probate Court can approve compromise of, minor's rights under will, *quaere*, 110 C 150

has no power to determine directly and conclusively construction of will, 110 C 150

partial distribution properly refused when executor made no account and suits were pending and threatening against estate, 110 C 658

M left real estate in trust for two sons, to go to each one's heirs at his death; distribution to heirs of one son made at his death, and at death of other son parties asked declaratory judgment, it being then admitted that gift of remainders was void; *held*

—that distribution of this remainder is matter exclusively in jurisdiction of Probate Court and cannot be directed by Superior Court in first instance, 116 C 396

—that in final distribution equities arising from illegal distribution of first remainder are to be regarded, 116 C 396

statute de appointment of persons to divide testate estate; Probate Court has no jurisdiction to appoint distributors if testator appoints some person, unless he becomes incapacitated, 117 C 374

statute that Probate Court shall ascertain heirs and distributees "so far as the will may leave the same indefinite and necessary to be defined"; in performing that duty court has jurisdiction to determine incidental questions, 117 C 376

—such as, in instant case, whether "net estate" amounts to million dollars under terms of will, if there is uncertainty, 117 C 376

Courts of Probate have full and exclusive jurisdiction of the settlement of estates, including power and duty to ascertain distributees so far as will may leave same indefinite and necessary to be defined, 120 C 97

—in performing its duty court has jurisdiction to determine such incidental questions as are necessary to a correct conclusion, 120 C 97

—cases where applied, 120 C 97

—in present case construction of will as to meaning of next of kin including first and second cousins *held* incidental and necessary, 120 C 97

functions of trustee under will ended with acceptance of final account; distribution of remainder reverted to Probate Court, 121 C 106

—which may sell real estate if necessary or advantageous, 121 C 106

§ 3. Claims

See also ESTATES OF DECEASED PERSONS § 2

has no power to pass on claims against insolvent estate, 10 C 232

—can order payment only of claims allowed, 10 C 232

Probate Court, in making an order for payment of debts allowed by commissioners on an insolvent estate, has power to make equitable preferences between different classes of general creditors, 27 C 241, 37 C 185

may reject entire report of commissioners on estate, for cause shown, but cannot revise report as to particular claims, 49 C 81

time of return of report of commissioners on estate is not necessarily the time report was "accepted," under statute, 49 C 81

duty of Probate Court to assist domestic creditors to reach assets of foreign testator, 49 C 421

§ 3 Probate Court

- does not depend upon any precedent notice to foreign heirs or representatives, 49 C 422
- in making division of fund of insolvent estate court exercises general chancery jurisdiction, 57 C 261
- may find and enforce equitable estoppel between creditors, as fully as the Superior Court upon a bill in equity, 57 C 261
- cannot determine validity of claims on estate on return of distributors, 68 C 84
- may authorize settlement of controversies and approve terms in advance, 71 C 590
- can order conservators to settle and compromise doubtful claims, 85 C 50
- compromising a promise to pay for land on a cash basis, 85 C 50
- effect of denial of application to approve compromise, 85 C 50
- after settlement of claim authorized and no appeal, legatee cannot attack court's jurisdiction, 86 C 463
- decree authorizing settlement of disputed claims, 86 C 463
- Courts of Probate and the Superior Court in appeals from them ordinarily have no jurisdiction to pass on validity of claims against estate of deceased person, 103 C 226
- but may have incidental power to do so, 103 C 226
- notice requisite in case of hearing by commissioners of claim against solvent estate, 105 C 596
- notice to claimant and executor enough, as latter represents those interested in estate, 105 C 596
- principle of marshalling stated, 106 C 603
- Probate Court may apply as between general administration expenses, expense of carrying on business, and claims where laches bars their assertion against land, 106 C 602
- in determining priorities duty primarily on creditors to show right to priority, 106 C 602
- where part of claim is asserted to have priority, if creditor fails to show what part entitled to it, all falls in lower class, 106 C 602
- granting extension of mortgage note not within scope of statute de compromising and settling disputed claims, 116 C 58
- executors and administrators have power to compromise disputed claims without court authority, 116 C 66
- purpose of statute, de approval by Court of Probate is to protect them from liability for loss, 116 C 66
- exercises discretion in extending time for presentation of claims, 123 C 362

§ 4. Sales

- See also ESTATES OF DECEASED PERSONS § 8
- general order of sale extends to all property known to court even if not inventoried, 2 D 305
- court cannot appoint person other than administrator to sell real estate, 4 D 137
- cannot order sale of land to pay legacy, 4 C 163, 9 C 10
- unless legacy is made a charge on the land, 9 C 10
- order of sale authorizes what kind of deeds only, 4 C 495
- must order sale of land if personalty is insufficient for debts, 6 C 265
- legislation de powers of Probate Court as to selling realty reviewed, 60 C 65
- statute enlarges rather than restricts the powers of Probate Court as to sale of realty, 60 C 67
- requires a hearing, exercise of sound discretion, and is subject to appeal, 60 C 67
- applies to all estates in settlement at date of its passage, 60 C 67
- cannot empower executor to sell where, after electing to take under will, he tries to make good his statutory share as husband of testatrix, 64 C 352
- proceedings in Probate Court in sale of real estate invalid where no notice of hearing, 67 C 1
- Probate Court ordering sale of real estate of deceased is exercising special statutory power, 68 C 412
- order of sale to pay debts will not justify sale after final accounting, 77 C 374
- order of sale will not justify exchange, 77 C 384
- quaere, whether order for sale of stock can be made after executor, who was directed to hold it during life of legatee, has filed final account as executor, and accounted as trustee, then died, and administrator of estate has been appointed, 81 C 94
- court should not order a sale where it will compel one legatee to buy or sell an interest at a loss, 81 C 95
- where trustee has power of sale, if necessary for purposes of will; effect of order for sale is to determine that necessity, 81 C 171
- can order sale of land if needed for payment of debts, 84 C 208
- it is within court's discretion to order sale of real estate whether required to pay debts or not; can do so for distribution among heirs; its finding is conclusive, 87 C 85
- trustee authorized to sell real estate within five years; *held* court could order sale thereafter, 105 C 263
- in determining whether real estate should be sold Probate Court does not adjudicate validity of claims but only inquires whether

reasonable cause exists to grant order, 114 C 689

§ 5. Miscellaneous Jurisdiction and Powers

may obtain possession of documents by summary process, 9 C 198

decree of Probate Court granting allowance to widow invalid where adequate provision for support is otherwise made, 19 C 408

has specially limited jurisdiction in appointment of conservators; must conform strictly to statute and particular circumstances specified therein exist, 26 C 273

extent of jurisdiction over testamentary trustees, 32 C 567, 45 C 122

powers and duties of guardians and administrators, the rights of wards, of legatees and creditors, and adjustment of all claims growing out of these relations form special province of Probate Courts, 33 C 512

where a third person claims property in the hands of an administrator Probate Court has no power to try question of title and to make an order that the administrator deliver the property to the claimant, 35 C 113

cannot declare forfeiture under conditions of will, 35 C 210

may dismiss one of two similar petitions for appointment of conservator, 37 C 363

must approve minor's selection of guardian if choice is a proper one; disapproval through whim or caprice is reviewable, 38 C 307

Probate Court alone has jurisdiction to assign dower, 42 C 53

may assign dower independent of application of heirs or widow, 42 C 374

has no sole jurisdiction over testamentary trustees, 45 C 122

no power to take personalty, after distribution, to pay debts then accruing, 45 C 600

affords ample security against every neglect or maladministration by executors, administrators and testamentary trustees, 49 C 588

—courts of equity can rarely have jurisdiction in such cases, 49 C 589

statute empowering Probate Court to order "partition" during settlement of an estate *held* to mean partition in ordinary legal sense and not a distribution, 52 C 421

—applies only where estate holds an interest in land as tenant in common, 52 C 421

cannot administer equities except where directly involved in matter on which it is acting, 53 C 24

—where widow allowed lands in which she had dower to be sold as unincumbered and so told purchaser, court cannot consider question of estoppel in application to set out dower, 53 C 24, 63 C 339

—as it did not grow out of relation of widow to estate, 53 C 24

in assigning dower court should be satisfied that applicant possesses statutory requisites, 53 C 36

has no right to determine title, 53 C 37

judge of Probate Court cannot direct money due ward to be paid to conservator to satisfy his claim, 53 C 111

—such direction is not a judicial order; invalid as outside jurisdiction, 53 C 111

—but where payment was made under such order to conservator, payment of claim would be good accounting where the claim was really due the conservator from estate of ward, 53 C 111

power of Probate Court to make allowance for support of widow during settlement of estate, 55 C 117

may apply rules of equity to abuses of confidence, etc., 56 C 1

cannot act upon an agreement between executor and debtor to estate, not to collect more than necessary to pay debts, 62 C 218

cannot try title or determine question of estoppel, 62 C 218

has exclusive jurisdiction as to questions whether applicant possesses statutory requisites entitling her to dower, 63 C 332

Probate Court may have jurisdiction over matter that would in equity bar dower, though concurrent with Superior Court, 63 C 333

—but where, after legal right to dower has attached, it becomes inequitable for widow to take, Probate Court has no jurisdiction, 63 C 333

—must leave parties opposed to assignment to their remedy in a court of equity, 63 C 333

—allegation of need of property "to pay debts," and that claim of widow "clouded the title," *held* sufficient to maintain injunction by executor against application for dower, 63 C 333

power to pass on antenuptial agreement claimed to bar widow's allowance, 66 C 127

discretion as to grant of allowance to widow during settlement of estate, a legal discretion, 66 C 136

power to pass on validity of trust, title to land, etc.; effect of decrees *de*, 71 C 129, 90 C 592

functions of, *de* ward under conservator, 71 C 590

may order mortgage of real estate held in trust, 77 C 411

whether court could decide on presentation of annual trust statement that trustee held as ancillary trustee under a New York appointment, *quaere*, 82 C 33

Probate Court can make order terminating trust and directing payment of money, 82 C 552

§ 5 Probate Court

has no power to determine disputed title to real estate, 84 C 560

under statute, can order title of real estate held by decedent in trust to be transferred to his successor or party entitled thereto, 84 C 560

—the question of title is considered only incidentally, 84 C 560

giving bonds and appointment of trustee is business of Probate Court, not Superior or Supreme Court in suit for construction of will, 86 C 631

court has no jurisdiction over voluntary assignment of a farmer; this is a matter for bankruptcy, 88 C 70

“residence” and “relatives” construed in statute de commitment of drunkards, 90 C 529

Probate Court has jurisdiction of involuntary assignment of a farmer who, under the bankruptcy laws, cannot be forced into bankruptcy, 90 C 601

statute providing for “support of widow or family,” during settlement of estate, does not include surviving husband, 91 C 76

jurisdiction over trusts continues until approval of final account, ascertainment of distributees and return of distribution, 92 C 287

jurisdiction over testamentary trusts is limited, statutory, and of recent origin, 93 C 402

—in settling accounts, has only such implied powers as necessary to exercise jurisdiction, 93 C 402

minor over fourteen may choose guardian; a national bank may be such, 94 C 648

the care of person and estates of minors is within jurisdiction of court, which is general, ample, and intended to cover all cases, 97 C 440

has exclusive jurisdiction as to custody of children except in divorce or on habeas corpus, 99 C 154

has no power to appoint guardian of illegitimate child until mother as natural guardian has been removed under statute, 100 C 201

—decree so doing *held* void on habeas corpus, 100 C 201

jurisdiction over testamentary trusts concurrent with Superior Court, 102 C 96

has no jurisdiction over trusts *inter vivos*, 102 C 96

appointment of commissioners discretionary with Probate Court, 105 C 596

whether abandonment which works a forfeiture of share of husband or wife in other's estate also bars granting allowance for support during settlement of estate, *quaere*, 107 C 101

payments made without order of Probate Court out of estate of brother at direction of mother for her maintenance where she is sole distributee and dependent on sons

for support do not come within statute de allowance to widow, 107 C 535

may authorize use of proceeds of mortgage of trust property to improve property already in trust, under statute, 109 C 187

does not have power to direct trustee as to duration of leases he may make, 109 C 205

has no jurisdiction to appoint guardian of minor over fourteen unless he has been given opportunity to choose, 111 C 243

—this applies to second choice after disapproval of first, 111 C 243

—decree is open to attack on habeas corpus, 111 C 243

care and management of incompetent's estate is primarily entrusted to Probate Court, of which conservator is in many respects the agent, 115 C 326

only Juvenile Courts and Courts of Probate have power to commit children to county temporary homes or other institutions, 115 C 596

exclusive function to authorize extension of time for payment of debt due estate is not incidental power of Court of Probate, 116 C 58

granting extension of mortgage note *held* not to constitute a continuance of business of decedent or an engaging in business by the executor, 116 C 58

—nor is it within the scope of statute de compromising and settling disputed claim, 116 C 58

authorizing executor or administrator to continue business, 120 C 337

when testamentary trustee has filed final account it is duty of Probate Court to determine all issues involved in ascertainment of property or money due beneficiaries, 121 C 388

—but courts of general jurisdiction may entertain actions against trustees for breaches of this duty, jurisdiction being concurrent, 121 C 388

may revoke or modify decree of allowance to widow, 123 C 424

on final account of conservator, Court of Probate has power and duty to determine all issues involved in ascertainment of property fiduciary is bound to deliver to persons entitled, 126 C 324

does not possess right to finally determine disputed title to property, 126 C 435

has full and exclusive jurisdiction of settlement of estates, 126 C 435

—whenever judgment involving title becomes necessary upon controversy within statutory jurisdiction, it has power to consider question so far as necessary, 126 C 435

statute providing that Courts of Probate may authorize executor or administrator to con-

vey deceased's real estate to person entitled to it by contract, or to successor, etc., 126 C 435

—when petition filed under statute, court must first determine whether there is substantial dispute; if so it cannot act, if not it may authorize conveyance, 126 C 435

—so in absence of substantial dispute on subordinate question of title, court had power to order administrator to convey property to one entitled to it under contract with deceased, 126 C 435

has determination of whether property in hands of ancillary administrator in this State should be remitted to principal administrator or be administered here, 127 C 108

—beyond power of Superior Court to assume primary jurisdiction to render judgments which would bring about administration of property in this State, 127 C 108

agreement, purpose of which was to postpone adjudication of issue of how surplus income was to be disposed of and to effect arrangement for its use in support of destitute heirs in interim, was proper matter to submit to Probate Court and its approval was conclusive on parties, including one represented by conservator, 127 C 207

recourse of party seeking security from legatee for personal property bequeathed on conditional limitation is to court of equity, not Probate Court, 129 C 350

statutory authority of Probate Court to order bond from life tenant of personal property, 129 C 354

§ 6. Effect and Conclusiveness of Decrees; Modification; Records

evidence of proceedings before Probate Court not of record, is inadmissible, 2 R 141, 520
exhibit on file and referred to in record, admissible to explain record, 2 R 181

decree is conclusive upon parties until set aside on appeal and cannot be inquired into collaterally, 1 D 170, 5 D 217

decrees are conclusive until reversed, 3 D 326, 17 C 389

—though erroneous, 1 C 467

—so a decree establishing will of testatrix incompetent to devise, 3 D 326

decree allowing administrator's account cannot be impeached in an action on the probate bond, 4 D 215

administrator protected by decree until reversed, 1 C 53, 38 C 269

cannot be impeached by strangers, except for fraud, 1 C 469, 39 C 524

order of sale of land must recite legal necessity for sale, 9 C 13, 10 C 87

—need not state reasons on which court proceeds, 10 C 87

court may for certain causes revoke its orders and correct mistakes, 13 C 226

not usual for Probate Court to make orders de settlement of estate unless requested by proper person, 15 C 122

decree can be varied or set aside only on appeal, for mistake of distributors, 17 C 392

where will has been duly proved and approved in Probate Court due execution cannot afterward be collaterally attacked, 23 C 1
distribution entirely within jurisdiction of Probate Court; can be set aside only on appeal to Superior Court, 24 C 241

records must show finding of all necessary jurisdictional facts, 31 C 381

quaere, as to power to annul decree accepting administrator's account, 31 C 381

power to annul or modify orders made without notice or hearing may be necessarily implied, 31 C 382

if within its jurisdiction, its orders and decrees are as conclusive as that of common law courts, 31 C 422, 62 C 151

decree approving will of minor empowered to bequeath personalty only, may be impeached as to part affecting real estate, 31 C 425

—though distribution has been made and accepted by court, 31 C 426

effect of decree approving statement in account, "appraisers made no return of personal property," when set up as bar to suit on bond, for failure to inventory, 32 C 553

approval of account of trustee under act of 1853, *held* not binding on beneficiary, 32 C 567

distinction as to conclusiveness, between preparatory and final orders, 35 C 122

finding as to residence of intestate, *held* not conclusive, 35 C 351

decree approving will does not validate void bequests, 35 C 523

—decree not erroneous because general in form, 35 C 523

decree settling account of executor is not conclusive as to his liability, 36 C 186

—while unreversed is conclusive as to amount remaining for distribution, 36 C 186

order of Probate Court is conclusive until set aside on appeal, 38 C 269

verbal order of distribution perfected by formal order unappealed from conclusive, 38 C 271

appointment of administrator by disqualified judge, unappealed from, is valid, 39 C 255

—mere record of disqualification of administrator is no revocation of appointment, 39 C 255

—new appointment by judge cited in *held* invalid, 39 C 255

§ 6 Probate Court

—quaere, as to revocation of appointment without notice, 39 C 255

decree of Probate Court settling an administration account cannot be attacked collaterally except for fraud; evidence not admissible to show items allowed in account ought not to have been allowed, 39 C 523

order of sale of land defective; *held* good until set aside on appeal, 45 C 196

record approving will is not conclusive as to domicile of testator, 48 C 166

may in its final decree correct errors and omissions in former and partial settlements, 49 C 520

testatrix dying within district of this State, but found domiciled in New York by court there; judgment *held* conclusive upon all parties to the proceedings, 50 C 330

—though will was invalid here and executed here, 50 C 330

—duty of court here to admit will to probate for ancillary administration, 50 C 331

as to all material and necessary facts upon which judgment depends, the records import absolute verity, 59 C 354

—except as to jurisdictional facts, 59 C 354

decree showing jurisdictional facts on its face is *prima facie* evidence of those facts, 62 C 144

—facts recited are open to contradiction, but not to collateral attack, 62 C 152

a decree of Probate Court setting out dower, unappealed from, is conclusive as to the possession of the statutory requisites by the applicant, 63 C 333

—where Probate Court sets out dower, its decree is not an estoppel, 63 C 333

—insolvency of the estate and deficiency of assets may be shown by other evidence than decree of Probate Court, 63 C 333

record imports verity, 64 C 491

conclusiveness of decree approving will, 64 C 491, 67 C 90, 76 C 416

may be attacked for fraud; concludes only parties and privies; allowance of conservator's account not conclusive on town in suit for support furnished ward, 66 C 137

effect of, as evidence of probate of will, 67 C 90

distinction between want of, and erroneous exercise of, jurisdiction, 67 C 185

nature of proceedings; conclusive as to distributees, 69 C 64, 71 C 122, 90 C 561

previous order fixing twelve months for settlement of estate did not affect order for monthly allowance to widow, 69 C 684

order directing allowance for support of widow protects executor in paying it, 69 C 694

judge may be compelled to correct record, 72 C 616

approval of bond relates back to filing; indorsement, "accepted," equivalent to decree approving it, 73 C 435

inclusion of income in fund transferred to trustee under order of court no bar to claim of life beneficiary to have it paid to her, 74 C 218

cannot be collaterally attacked; appointment of guardian, 75 C 308

where parties unite in request for order never appealed from, conclusive upon them and their privies, 75 C 603

reopening decree approving will after estate is settled, improper, 76 C 412

order cannot be proved by parol, 76 C 559, 77 C 70

orders approving accounts of trustee conclude rights of beneficiaries or remaindermen if notified and present at hearings, 77 C 70

acceptance of trustee's account showing departure from terms of trust will not justify further acts of same sort, 77 C 70, 79 C 555

Probate Court can amend records to correct errors, 81 C 128

can modify an *ex parte* order at discretion; this is reviewable, on appeal, at discretion of Superior Court, 81 C 682, 90 C 529

foreign judgments of Probate Court entitled to full credit, 81 C 686

ordinarily cannot revoke its own decrees, 81 C 688

the acceptance of certain accounts that do not include certain item is not an adjudication that it should not be included, 82 C 33

decree appointing administrator on estate of alleged testamentary distributee not open to attack on appeal from order of distribution, 83 C 235

account of conservator filed and approved, admissible but not conclusive on question whether certain funds went into the estate, 85 C 279

judgment removing executor not open to collateral attack for errors in preliminary steps, 86 C 282

conclusiveness of finding that claim is doubtful, 86 C 462

record of court *prima facie* proof that A is executor and that estate is still in settlement, 87 C 617

where one applies to court for his commitment alleging its jurisdiction, he cannot afterwards challenge the jurisdiction, 90 C 529

power to revoke and modify a probate order, 90 C 530

party to a decree cannot attack it collaterally; action for damages does not lie for securing admission of will by fraud, 91 C 514

cannot revoke a distribution after notice and appeal; can revoke or modify *ex parte* orders before appeal, 92 C 25

decrees to file trustee's account and to turn over balance are separate and distinct; if one is bad, other can be upheld, 92 C 286

order for an account on a certain day requires it to be made substantially as of that day, 92 C 292

its appointment conclusive on appointee's right to act, if it had jurisdiction, 92 C 649

decree of court without jurisdiction is a nullity, 92 C 649

is of limited jurisdiction, 100 C 201

—therefore orders and decrees not conclusive as to jurisdiction, 100 C 201

—but may be collaterally attacked on that ground, 100 C 201

contents of document missing from probate records and files may be proved, 105 C 230

possesses only powers given expressly or by necessary implication, 107 C 281

—power to set aside decrees limited, 107 C 281

—after estate fully settled, decrees rendered after legal notice may not be set aside, though interest of husband in it was fraudulently concealed, 107 C 281

may modify or revoke ex parte decree, but not one made after full hearing, 110 C 646

—death of party after hearing but before decision not ground to reopen decree, 110 C 646

—decree was not void, 110 C 646

decree appointing guardian over fourteen open to attack on habeas corpus, 111 C 243

effect of adjudication of incompetency is to render person conclusively incapable of making valid contract while conservatorship continues, 113 C 594

—contracts void not merely voidable, 113 C 605

P sought declaratory judgment to determine whether decree of Probate Court that will was void settled conclusively rights of parties and, if not, determination of his rights; held demurrer to it should have been overruled, 116 C 201

—but as plaintiff had no title to property, demurrer to prayer that title to real estate should be quieted in him properly sustained, 116 C 201

—administrator d. b. n. c. t. a. necessary party to action and should be appointed and joined before further proceedings, 116 C 201

decree of partial distribution not res adjudicata as regards rectification on decree of final distribution, 116 C 396

so long as decree of Probate Court admitting will remains in effect, there is no right to original action in Superior Court for misappropriation of funds, etc., by executors, 117 C 565

acceptance of account and mutual distribution including certificate of deposit not a judgment

that the title was in deceased as regards bank not a party to the proceedings, 118 C 42

decree of, if unreversed, is conclusive as to all relevant matters embraced therein, 124 C 416

allowance of account of executor or administrator of deceased life tenant trustee, not appealed from, determinative of rights between trustee, his estate and beneficiaries, 124 C 416

—where, however, such account stated facts regarding use of fund and property he found remaining in trust, allowance extended no further than to confirm accuracy of statement and funds in hands of trustee at her death, 124 C 417

—matter of improper investments not determined, 124 C 417

—so where trustee had power of appointment over estate of original testator, similar account by administrator of testator's estate did not determine issue as to legality of investments, 124 C 417

—surety on trustee's bond liable for loss due to improper investments, 124 C 417

decree if unreversed is conclusive as to all relevant matters, 126 C 324

after acceptance of final account action for breach of duty by fiduciary may be brought, and decree would create estoppel only as regards items within administration of estate, 126 C 324

—for such breach of duty no recovery of substantial damages can be had except such as were result of it, 126 C 324

—failure of plaintiff's conservator to discover and inventory his interest in farm partnership did not produce substantial injury, 126 C 324

—moreover his interest in the real estate was brought into administration by application for order of sale and was accounted for in final account, unappealed from, 126 C 324

—claim that sale was invalid too late when it was not raised by objection to final account, 126 C 325

under certain circumstances decree of Probate Court acting within its jurisdiction would be res adjudicata, though court is one of limited jurisdiction, 129 C 70

decree of Probate Court after statutory notice and upon hearing is not ex parte within statute permitting it to modify or revoke ex parte decree before appeal, even as regards party who had no actual notice, 129 C 309

Probate Courts have no power to open decrees they have made except under specific statutory authority, 129 C 316

whether Probate Court will open ex parte decree rests in its legal discretion, 129 C 316

§ 6 Probate Court

Probate Court has no power to open decree on ground it was procured by fraud, accident or mistake, 129 C 316

§ 7. Appeals from Probate

§ 8. —In General; When Appeal Lies

reversal of all probate decrees appealed from is error as too general, when, 4 D 137

appeal lies from every order, sentence or decree in relation to settlement of estate, 7 C 23

legality of appeal not affected by fact that all the other heirs are satisfied, 7 C 226

one appealing from decree accepting distribution may show the injustice and inequality of the distribution, 9 C 226

appeal lies from decree accepting or rejecting report of commissioners, 11 C 420, 12 C 139

—previous review of same report on appeal of another creditor is no objection, 11 C 420

later decree, if reversed, reverses prior inconsistent decree, 13 C 221

appeal from doings of commissioners vacates their report de that entire claim, 15 C 588

—whole claim presented may be tried de novo on the appeal, 15 C 588

—allowance to party not appealing may be increased on the trial of the appeal, 15 C 599

appeal cannot be taken to an adjourned term, 19 C 5, 24 C 145

—nor to day of next term subsequent to commencement, 24 C 145

when appeal affects other than the executor, parties in interest shall defray expenses, 19 C 408

appeal appropriate remedy from decree allowing account omitting debts collected, 21 C 237

decree partially reversed for including illegal fees of probate judge, 21 C 556

decree appealed from need not disclose appellant's presence; that may be shown by parol, 29 C 562

appellant of record may settle case with appellees and orally withdraw the appeal, 32 C 331

—unless appellees were aware that appellant in fact represented other heirs in taking the appeal, 32 C 334

appeal does not of itself vacate the decree appealed from, 34 C 109, 362, 54 C 231

appeal lies from decree accepting report of distributors of dower, 34 C 488

appeal on ground that insolvency proceedings are superseded by bankrupt law must show what, 36 C 23

appeal lies from decree appointing a guardian, 39 C 538

appeal lies from discretionary, as well as other orders of court, 39 C 538, 55 C 410

executor or administrator of one appealing from probate decree may by statute continue the suit, 41 C 329

a suggestion to court on appeal that Probate Court appointing commissioners had no jurisdiction should be favorably received, 43 C 110

appeal from one of two distinct claims does not bring up the other, 46 C 38

a decree once affirmed on appeal may be again appealed from by another party, 47 C 248

—second appellant not barred by his knowledge of first appeal, 47 C 248

—nor by his presence as a witness, 47 C 248

an appeal does not lie from an order of Probate Court denying an appeal, 49 C 69

—statute *held* not to embrace such a case, 49 C 70

appeal by one legatee de items in executor's account does not affect other legatees de other items, although account was in the main confirmed, 49 C 519

party appealing from partial account is bound to make all objections then existing to such account, 49 C 519

appeal lies from commissioner's valuation of creditor's security under statute, 51 C 107

appeal from decree approving will; issue stated, where no reasons are filed, 54 C 120

Probate Court should be advised as to action taken by appellate court on its decrees, though no judgment of affirmance is strictly necessary, 54 C 231

a discretionary order is reviewable on appeal to Superior Court, 55 C 412

where the appeal is void, the court cannot acquire jurisdiction by parties' consent, 61 C 380

—otherwise if voidable, 61 C 381

an appeal from probate of will is not "an action" within statute de memoranda of deceased, 63 C 393

appeal as to value of security held by creditor does not involve amount of claims, 68 C 184

appeal lies, though action of Probate Court was without jurisdiction, 71 C 131

appeal from commissioners' doings in allowing claim, if not limited, vacates all their doings incident thereto, including valuation of creditor's security, 71 C 708

none lies from determination of distributees apart from order of distribution, 72 C 322

undue influence not in issue unless assigned in reasons of appeal, 74 C 258

does not vacate decree, 75 C 308

none lies from refusal to allow; mandamus, 76 C 426

admitting will to probate does not prevent appeal from order of distribution on ground that bequest is invalid, 79 C 506

appeal from allowance of administrator's account does not raise issue as to necessity of new inventory and appraisal, 80 C 623
on disallowance of claim by commissioners; filing claim, with averment of appeal not sufficient; amendment does not change claim, if real object is still the same, 81 C 433

modification of *ex parte* order is reviewable, 81 C 682

on appeal from commissioners, statement of claim takes place of *ad damnum* clause, 83 C 34

validity of appointment of administrator on estate of alleged distributee not open on appeal from order of distribution, 83 C 235

burden of proof on appeal from allowance of account based on claim of uninventoried assets, 84 C 659

—such a proceeding is an “action” as regards declaration of decedent, 84 C 659

writ of prohibition not issued when appeal is proper remedy, 86 C 351

not allowed from Probate Court's appointment of administrator on estate of person presumed to be dead, 88 C 423

on appeal from probate of will, validity of widow's title to property acquired from husband, not in question, 88 C 656

appeal lies from order for receiving and recording mutual distribution, 89 C 421

on appeal, controversy is not a civil cause or action in the ordinary sense and does not entitle party to jury; appeal from ascertainment of heirs, 90 C 48

Probate Court's final decree modified only by appeal, 90 C 530, 92 C 25

appeal from allowance of guardian's account, 101 C 349

accepting return of sale is purely ministerial act; not appealable, 105 C 685

right exists only where person is aggrieved and in matters not otherwise specially provided for, 107 C 354

—statutory requirements stated, 107 C 354
power to remove fiduciary for neglect discretionary; not reviewable unless abused; purpose of statute authorizing it, 107 C 535

where all statutory requirements as to notice are complied with, right of person to appeal from decree admitting will to probate and to hearing *de novo* is sufficient to constitute due process of law, even though he has no actual notice, 129 C 309

§ 9. —Who May Appeal; Interest

executor of party appealing from distribution of realty cannot enter on decease of appellant, 1 R 204

party not presenting claim may appeal for irregularity in return or appointment of commissioners, 1 R 244

infant may appeal at any time during minority, 1 R 275

heirs, legatees and creditors may appeal from allowance of administrator's claim, 2 R 33

grantee of intestate cannot appeal from order of sale of the property as estate of the intestate, 2 R 220

judgment of Probate Court accepting report of commissioners allowing unjust claims appealable by heirs, 2 R 270

appellant's interest must appear on record, 4 D 137, 20 C 521, 34 C 201, 46 C 527

—omission is not remedied by statement of interest in reasons of appeal, 46 C 527

—may properly appear in the motion for appeal, 4 D 137, 46 C 527

—extent of interest and how affected may appear in reasons of appeal, 20 C 521

—allegation that appellant is brother or sister is not an averment of interest, 46 C 527, 52 C 216

lies by every “aggrieved” person from any order or decree, 8 C 91, 55 C 223

—one is “aggrieved,” within statute, who will thereby suffer pecuniary injury, 46 C 528, 55 C 229

—must appear in motion for appeal that he will thus suffer, 55 C 223

—averments of grievance *held* sufficiently explicit, 55 C 223

creditor not exhibiting claim may appeal from order accepting report, 13 C 221

who are proper parties defendant to appeal from doings of commissioners, 18 C 282

voluntary grantee of person since insolvent may appeal from doings of commissioners, 20 C 521

—also a creditor of an estate represented insolvent, 20 C 521

after reasons of appeal are filed it is too late for appellee to set up appellant's want of interest; this is a preliminary objection, 22 C 125

an appeal by the “wardens and vestry” of church *held* valid, 22 C 125

party not estopped from appealing when he had no statutory notice of probate of will, although he had expressed an intention not to oppose probate, 26 C 384

legatee may appeal in his own name from doings of commissioners in disallowing claim for breach of bond of deceased executor, 27 C 344

objection that appeal states only that appellant is “aggrieved” is too late after trial on merits, 34 C 201

party having a beneficial interest in the claim rejected may be “aggrieved,” 43 C 110

§ 9 Probate Court

mandamus lies to compel probate judge to correct error in appeal de interest of appellants, 52 C 218

—delay in applying for correction, unless negligent, will not prevent correction, 52 C 218

legatee under prior will *held* “aggrieved” by decree probating later will, 57 C 544

—appellant need not have proved prior will, 57 C 544

executor has sufficient interest to justify an appeal from order to turn over funds to a foreign trustee, 58 C 223

attaching creditor of one adjudged insolvent has no right of appeal from such adjudication, 59 C 25

where distributors fail to provide for conditions imposed on estate by testator, any distributee aggrieved may appeal; appeal from appointment of distributors unnecessary; that other relief is possible of no consequence, 64 C 41

interest of appellant must appear; otherwise case will be erased from docket, 64 C 277

—mere formal allegation that plaintiff is aggrieved not sufficient, 64 C 277

where executor takes appeal, but signs reasons of appeal individually, appeal is irregular, 64 C 352

“aggrieved” applies only to persons having a direct pecuniary interest in matter in controversy, 64 C 533

interest must be pecuniary; interest in representative capacity; trustee in insolvency cannot appeal from order refusing extension of time for presentation of claims against the estate, 70 C 455

husband who has renounced interest in wife’s estate cannot appeal from orders as to it, 76 C 426

sole heir can appeal from order as to settlement of disputed claim, 76 C 426

appeal by infant through next friend, where guardian refuses to act, 76 C 426

proper party to appeal from order of sale of estate of ward, made before ward’s death, where conservator is acting fraudulently, 81 C 127

motion for appeal by executor from allowance of unjust claim by commissioner sufficiently states interest, 82 C 500

appellant must have direct pecuniary interest in the estate; those interested in one estate cannot appeal from a decree upon another estate, from which they indirectly benefit, 106 C 582

unascertainable beneficiaries of charitable trust cannot appeal; must be represented by trustees or attorney general, 106 C 582

allegations in reasons of appeals do not supply omissions to averred facts showing interest in motion for appeal, 106 C 582

where statement of interest in appeal is legal conclusion not amounting to particular statement required by statute, appeal should be erased from docket, 106 C 583

where party directly interested in estate dies, right to appeal rests in representative of estate, 106 C 586

meaning of “aggrieved” in statute as to appeals, 106 C 599

right of minor to appeal from authorization to guardian to approve settlement of rights under will, on coming of age, 110 C 150

where party died after hearing but before decision, his attorney could not prosecute appeal, 110 C 646

—but right would survive to executor or administrator, who might take appeal, 110 C 646

—and death of party would suspend running of limitation of time for appeal, 110 C 646

appeal stating that appellant was legatee under will in question and under another will; pecuniary interest of appellant may appear from probate records, 112 C 457

plea in abatement to appeal which did not set forth that interest of appellant did not appear on probate records, defective, 112 C 457

decisions illustrating extent and limitations of the interest necessary as a basis for an appeal by one acting in representative capacity from probate decree reviewed, 117 C 201

—persons recognized as having right are those acting in fiduciary or representative capacity under subsisting appointment which has not been terminated, and who are under present duty to protect estate, 117 C 201

Probate Court admitted will and removed A, previously appointed, as administrator; *held* A had no interest which entitled him to appeal, 117 C 201

—he might have appealed from decree fixing compensation up to time of revocation of appointment or affecting validity of his acts which might involve personal liability, 117 C 206

where appeal from decree is taken as administrator, appellant not required to set forth interest farther; since claimed interest sufficiently appears of record, no proof required, and motion to erase appropriate remedy, 117 C 202

one of essentials of valid appeal is fact that appellant is aggrieved, and this question is properly raised by a plea to the jurisdiction, 120 C 405

—so when appellee filed plea to jurisdiction on ground that appellant was not grandson, hence not heir-*àt*-law and not aggrieved by order of distribution, court properly decided

this question as preliminary to all others, 120 C 405

unless appellant is "aggrieved" Superior Court without jurisdiction to entertain appeal, 122 C 331

—such as where one has pecuniary interest which is affected or where one is acting in representative capacity for those whose interests will be affected, 122 C 331

—but where beneficiaries would take same interest under will as plaintiff claims it should be established, and under will as admitted to probate, she had no such interest as executrix or trustee as would support appeal, 122 C 327

—but as trustee was given discretion to spend principal of trust for beneficiary, which powers would be vested in her as trustee instead of G if her claims were sustained, she, as beneficiary of the trust, was aggrieved by decree, 122 C 328

appeal from probate not restricted to decrees which directly affect pecuniary interest of appellant, 122 C 333

—appeal would lie from decree concerning adoption of child, 122 C 333

executor or administrator may not appeal from disallowance of claim against estate, 127 C 141

grievance to person's feelings or sense of justice will not give him right of appeal; appellant must show direct pecuniary interest, 129 C 67

—trustee removed by Probate Court not ordinarily entitled to appeal from decree removing him, 129 C 67

where probate decree took from heir property to which she was entitled, she could appeal as "aggrieved" person, 129 C 137

§ 10. —Powers of Superior Court on Appeal

appellate court fixes the principles of law involved in the appeal, but does not proceed to settle the estate, K 284

Superior Court on appeal may revise decree of Probate Court allowing credit on administration account for payment of claim against estate, 8 C 87

Superior Court does not interfere in questions cognizable by Probate Court, except by virtue of its appellate jurisdiction, 9 C 196

appellate court may admit same testimony as Probate Court could, 9 C 231

every act of Probate Court is subject to revision on appeal, 10 C 192

Superior Court has jurisdiction only over the decree appealed from, 15 C 523

appellate court to determine from what fund costs are to be paid on probate appeal, 19 C 533, 22 C 270, 38 C 304

a single decree affecting interests of both parties may be set aside as to appellee as well as to appellant, 23 C 516

Superior Court not confined to facts found by Probate Court as the basis of its decrees, 39 C 395

—tries case de novo, 39 C 401

jurisdiction of assignment of dower, is in Probate Court alone, 42 C 53

Practice Act does not enlarge equity powers of Superior Court on an appeal from Probate Court, 53 C 35

if decree be approved, a judgment of affirmance is not strictly essential in Superior Court, 54 C 224

—but Probate Court ought to be advised of action taken above, 54 C 224

where refusal of Probate Court to appoint a certain trustee is appealed from, that issue should be passed on in appellate court, 54 C 324

on appeal from doings of commissioners the question is whether the claim should be allowed against the estate, 54 C 524

—such appeal differs from an appeal from a decree of Probate Court, 54 C 524

an appeal from final account reaches items previously accepted by court on a partial accounting, 56 C 2

—especially where appellant was not notified of the partial accounting, 56 C 2

no greater than Probate Court, 64 C 360, 84 C 560, 90 C 48

cannot pass on validity of claim on estate, 68 C 84

has no greater power than distributors or Court of Probate, neither of which can determine validity of claims, 68 C 84

powers on appeal from allowance to widow, 69 C 699

on appeal from distribution, as intestate estate, of property bequeathed by will, has full jurisdiction and may authoritatively determine validity of bequest, 71 C 122, 81 C 161

power to settle administration account, 72 C 555, 80 C 401

has wider power than Probate Court as to adjudicating upon validity of testamentary trust, but it should be exercised with reserve, 74 C 601

power to appoint administrator, 76 C 121

trial is de novo; powers of court, 76 C 121, 90 C 48

power to grant administration for collection of doubtful claim, 76 C 379

has wider power as to construction of will, 77 C 706

Superior Court on appeal from Probate Court cannot pass on title to real estate, 84 C 560

on appeal, Superior Court may determine domicil of deceased, 86 C 351

§ 10 Probate Court

Superior Court on appeal, cannot determine disputed question of title, 90 C 51

Superior Court stands in place of Probate Court, without any greater powers, 97 C 443

costs are discretionary with Superior Court upon appeal from probate, 101 C 401

Courts of Probate and Superior Court in appeals from them ordinarily have no jurisdiction to pass on validity of claims, 103 C 226

—but may have incidental power to do so, 103 C 226

upon appeal from acceptance of administrator's account, rights of heirs under contract with him cannot be considered, 104 C 271

appeal from probate may be erased from docket when, on face of record, no right of appeal exists, 105 C 595

if want of jurisdiction appears on face of record, appeal should be erased from docket as soon as court's attention is called to it, 107 C 281

—discretion of court as to taxing costs on appeal from probate, 107 C 281

—none allowed on motion to dismiss, 107 C 281

Superior Court sits as a Court of Probate, 107 C 285

Superior Court on appeal, cannot directly construe will, 110 C 150

what questions reviewable on appeal from appointment of guardian by Probate Court, 111 C 243

scope of appeal from order of Probate Court cannot be enlarged by sending back to add party, 111 C 683

where Probate Court has refused to allow account as whole, on appeal Superior Court may, so far as it may without exercising power vested exclusively in Probate Court, settle the account, 122 C 64

—but it cannot exercise discretion vested in Probate Court; can only review exercise of that discretion, 122 C 64

—Superior Court cannot exercise a primary jurisdiction which by statute is reposed in Courts of Probate, 122 C 64

on appeal from allowance of account of widow as administratrix, Superior Court might disallow payments made under decree of court as widow's allowance, where Probate Court could not have reasonably done otherwise than terminate allowance if attention had been called to it, 122 C 79

—otherwise Superior Court can only remand case to Probate Court for action by it, 122 C 79

Superior Court reviews action of Probate Court in extending time for presentation of claims only to determine its reasonableness, 123 C 362

Superior Court cannot exercise a primary jurisdiction which by statute is reposed in Court of Probate, 124 C 111

—it can settle an account only on appeal from doings of Probate Court and then only so far as it can without exercising a power vested exclusively in Probate Court, 124 C 111

upon an appeal from decree on administrator's account, Superior Court may, even though it finds account filed in Probate Court incorrect, settle the account, 124 C 216

—whether it should do this is matter within its discretion, ordinarily reviewable only to determine whether it was reasonably exercised, 124 C 216

—some of the considerations which Superior Court should regard in determining, if it finds account incorrect, whether to settle account or dismiss appeal and leave matter to Probate Court, stated, 124 C 221

where question on appeal from decree disallowing account was whether administratrix exercised due diligence and prudence in managing estate, Superior Court could determine this as well as Probate Court, 124 C 221

—should have retried case in light of opinion of Supreme Court in former appeal and settled account except as to any issue determination of which in first instance is vested exclusively in Probate Court, 124 C 222

amount of allowance to executor for attorney's fees is primarily in discretion of Probate Court and should not be included in account as stated and allowed in Superior Court, 124 C 543

—latter may properly allow credit for any expenditures he has made or may leave matter to Probate Court, 124 C 543

whether there was value received by transferor in transfer in contemplation of death so as to reduce inheritance tax, could have been determined by Superior Court on appeal from probate, or it could have remanded case with direction to decide question, 125 C 681

—would not be decision of Superior Court of issue not involved in proceedings in probate or exercise of discretion vested solely in Probate Court, 125 C 681

Superior Court may grant relief against decrees of Probate Court procured by fraud, accident and mistake, 129 C 309

—Probate Court has no power to open decrees it has made on such a ground, 129 C 316

appeals to Superior Court are heard de novo, 129 C 315

at least as regards admission of wills to probate, Superior Court has all the powers of a Probate Court, 129 C 315

§ 11. —Procedure

minor appealing in his own name is liable for costs, 1 R 325

may be taken at any time before next Superior Court, 1 R 476

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decrees appealed from must be particularly described, 2 R 159

—what description is sufficient, 2 D 12

one appeal may be taken from several decrees, 6 C 355

bond on appeal to be taken to probate judge, 9 C 388

appeal from decree of Probate Court cannot be taken to an adjourned term of Superior Court, 19 C 1, 24 C 140

—nor to day of next term subsequent to commencement, 24 C 140

costs on appeal disallowing items in administration account are to be paid by whom, 19 C 533

appeal allowed on one ground may be prosecuted on additional grounds, 20 C 527

refusal to tax costs for either party on probate appeal *held* no error, 22 C 270

“next court” means next stated term of court, 24 C 145

those made parties to appeal by order of notice have right to appear and defend, 24 C 146

merely appearing by attorney will not dispense with necessity of appeal to next term, 29 C 561

ward need not be notified to be present at settlement of guardian’s account and the record need not contain anything relative thereto, 29 C 563

—only effect of want of such notice is to extend time for appealing to Superior Court, 29 C 563

motion to withdraw probate appeal may be oral, 32 C 335

appellant confined to rules applicable to case set up in his reasons of appeal, 32 C 520

appeal taken in season *held* not invalidated because bond was not given until after time for an appeal, 33 C 122

—but Probate Court may refuse appeal unless bond is then given, 33 C 122

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reasons of appeal de validity of will and issues formed thereon are not governed by strict rules of pleading, 34 C 434

—general verdict on such issues is sufficient, 34 C 434

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special act extending time for appeal *held* constitutional, 45 C 322

technical rules of pleading do not apply, 48 C 205

the “twenty-one days” within which to appeal under statute from doings of commissioners dates from acceptance in fact of the report, 49 C 79

—not from subsequent date of making up the record, 49 C 79

appeal pending at time revision of 1888 took effect, *held* not affected, 57 C 333

appeal not taken within time limited by statute *held* voidable only, 61 C 378

—statute does not prohibit court from allowing appeal after time limited, 61 C 384

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technical rules as to formation of issues, etc., not applicable, 80 C 401

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§ 11 Probate Court

controversy in Probate Court is not a civil cause or action in the ordinary sense and is not so on appeal; not entitled to a jury, 90 C 48

it is the duty of judge of probate to correct error in return day on application before service; error due to false statement of counsel; mandamus, 91 C 110

formal written motion for allowance of appeal not necessary when, 91 C 111

provision limiting one month for appeal for those having "legal notice" to be present, but twelve months if they "have no notice" and are not present, construed, 96 C 319

—"legal notice" means any notice authorized by law, as by publication, 96 C 319

an appeal should be taken from the order constituting the real grievance, and grievance must be by particular order appealed from, 105 C 596

—appeal from commissioners brings up all their doings, including failure to give proper notice of meeting, 105 C 596

—history of statutes as to appeal, 105 C 596

if statutory requirements are complied with, appeal must be allowed, and irregularities render appeal voidable upon plea in abatement, 107 C 354

—if record shows appeal not taken in time allowed by statute, this cannot be contradicted by allegation in answer to plea in abatement, 107 C 354

—if appeal allowed in statutory time, bond may be later accepted, but otherwise if appeal not allowed in time, 107 C 354

appeal is part of probate proceedings and cannot be amended in Superior Court, 112 C 458

no jury trial allowed in Court of Probate or in the Superior Court upon an appeal from a probate decree adjudicating a trustee's account, 121 C 393

separate appeal must be taken from allowance of each claim by commissioners on insolvent estate, 122 C 242

motion to dismiss is addressed solely to record; it is not proper to allege facts not appearing thereon, 122 C 327

—so admission by plaintiff at hearing on motion to dismiss appeal from probate could not enlarge scope of issues raised by motion, 122 C 330

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where no appeal taken from order making widow's allowance, judgment sustaining appeal from final account which raised issue of allowing credits for such allowances erroneous, 123 C 424

—unappealed decree of Probate Court was conclusive, 123 C 427

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PROBATION

See CRIMINAL LAW AND PROCEDURE § 18

PROCESS

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§ 1. In General; Issuance

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§ 2. Service

§ 3. —In General; Necessity; Requisites must be on each of the defendants described as residents though some may be then out of the State, K 4

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in qui tam information under a statute any reasonable notice of suit, ordered by court, is sufficient, 10 C 468

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- "service" means the commencement of the action by legal notice given to the defendant, 17 C 216
- same writ may be twice served, if proper erasures and indorsements are made, 18 C 290
- service by summons and attachment on single defendant must be completed by officer who began, 20 C 377
- resignation of officers to prevent service of process *held* of no effect, 20 C 447
- leaving copy with its only stockholder might be sufficient, 20 C 447
- unauthorized appointment by president of company of attorney to accept service; service on attorney *held* illegal, 28 C 557
- principal place of business of corporation, 40 C 70
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- where landowner received proper notice but in an informal way, 48 C 272
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- the day of service to be counted and the first court day to be excluded, 51 C 27
- service of writ against street railway by leaving it with resident director, 69 C 283
- necessity of giving defendant notice by service a reasonable number of days before the session of court is only restriction on right to begin a civil action at any time, 73 C 229
- service more than six weeks before return day in New Haven *held* valid, 73 C 559
- service on one of several counsel of application to rectify finding is service on all, 81 C 452
- lawful service not necessary if defendant appears and contests case on merits, 83 C 243
- officer attaching shares of stock need not get certificate showing number of shares owned to make service good, 84 C 619
- if statutes do not provide specifically as to time for service and return of writ of error from City Court, Supreme Court cannot prescribe it, 85 C 374
- writ of error abated unless served thirty days before sitting of Supreme Court, in the same manner as civil process, 85 C 375
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- in apartment house, each apartment is a separate dwelling, 92 C 388
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- writ of summons must be accompanied by complaint to make service valid, 97 C 400
- defects in service waived by answering upon the merits, 101 C 658
- copy of cross-complaint must be served on party to support judgment, 101 C 658
- cross-complaint in mortgage foreclosure setting up mechanic's lien is in court if served on plaintiff though not on owner of equity, 101 C 659
- plaintiff could not complain of defect in any event, 101 C 659
- no judgment affecting owner of equity could be rendered, 101 C 659
- effect of provision in rules requiring service of cross-complaints, 101 C 664
- service of writ of error referring to record of trial court as an exhibit but not attaching it *held* not abatable, 104 C 112
- statement by sheriff to defendant's attorney as to when writ had been served is within his implied authority and is not hearsay, 107 C 492
- in this State order of notice is only procedure for importing into record fact of notice of order to one not a party but affected by it, 109 C 27
- where city charter makes no provision as to time for service of process on garnishee in suit in City Court, General Statutes are applicable, 113 C 770
- where no process was served on defendant, and on garnishee six days before return day where twelve was required, *held* action was abatable, 113 C 771
- purpose of statute excluding from time limited for bringing actions the time during which party is without State was to preserve right of action during absence, when it was impossible to get personal service, 116 C 643

order of notice by court not having jurisdiction is void, 117 C 39

where certified copy of order of removal from District Court of Waterbury to Superior Court was not served on adverse parties, latter court did not acquire jurisdiction, 117 C 39

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§ 4. —Authority of Officer; Indifferent Person

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leaving copy of writ inside outer door of tenement house not sufficient service on tenant of apartment therein, 108 C 13

—court could acquire no jurisdiction thereby and all proceedings were void, 108 C 13

—purpose of statutory requirements as to service is to assure actual notice to defendant, 108 C 16

§ 6. —Nonresidents; Service by Mail; By Publication

writ against A and B describing B as nonresident; service on A alone sufficient, though B become resident before return day, 1 D 141

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§ 1245, Rev. 1888, governs service of foreign attachment against nonresident, rather than § 910, Rev. 1888, 56 C 341

—a copy need not be left with agent or attorney of defendant in this State, 56 C 341

a nonresident voluntarily submitting to jurisdiction waives service, 59 C 136

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garnishment of debt due nonresident is in rem; no service on defendant necessary; service on garnishee sufficient, 79 C 15

attachment of stock of nonresident is a proceeding in rem; if he appears, it becomes in personam, 84 C 618

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service of condemnation application by mail under order of court, valid, 86 C 361

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—but not if plaintiff has only done what he had a clear legal right to do, 99 C 95

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—previous to enactment only method of securing personal judgment against nonresident was by service on him while within State, 116 C 645

service upon defendant nonresident made upon motor vehicle commissioner December 10, 1931; accident happened November 3, 1930; *held*

—same application of Statute of Limitations as in cases where personal service is had, 116 C 643

—and statute de exclusion of time of absence from State does not apply; action barred in one year, 116 C 648

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signature of nonresident defendant on registered mail return receipt can be proved by

witness who was familiar with his handwriting but who was not expert and had never seen him write, 121 C 32

service on foreign insurance company by service on insurance commissioner, 121 C 309

—copy of certificate of his appointment as attorney for insurance company while sufficient evidence of authorization, is not exclusive method of proof, 121 C 309

—reception of process by him, collection of fee, presumption of lawful performance of duties, etc., afford inference of his authorization, 121 C 309

—but where officer's return did not state that commissioner was absent and service was made on his chief clerk, *held* execution was not properly served under statute, 121 C 309

statute de service on motor vehicle commissioner in suit against nonresident for automobile accident does not give jurisdiction against latter's administrator, 126 C 92

—appointment of commissioner as attorney for nonresident revoked by latter's death, 126 C 94

service of process on wife by ordinary mail, particularly where she entered special appearance and contested issue of jurisdiction, was all that was required to constitute judgment of Florida court one entitled to full faith and credit, 128 C 634

§ 7. —Privilege and Exemption

nonresident party attending court here, is not privileged from being served with process, 27 C 1

—quaere as to nonresident witness, 27 C 1

nonresident defendant attending trial here, is privileged from summons in a civil action, 51 C 595

—plea in abatement to action so brought will lie, 51 C 595

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nonresident in State to give testimony in a suit to which he is not a party is exempt from service, 82 C 585

nonresident is exempt from service when appearing voluntarily as witness or defendant in civil action, 102 C 12

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§ 8. Return

NOTE: For return of execution, see EXECUTION § 8

return of indifferent person need not be sworn to, 1 R 175, 285, 23 C 242

return to house of clerk, *held* sufficient, 2 D 480

is prima facie evidence of facts stated in it, but may be disputed, 4 C 80, 424, 6 C 334, 15 C 36, 28 C 237, 44 C 133

—both on mesne and final process, 6 C 334

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return setting out tax sale; presumption that officer did his duty, 7 C 505, 10 C 146

—what averments are sufficient, 7 C 505

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under statute return on written copy describing property attached as "all the stock and goods in said defendant's store situated" etc., *held* insufficient, 62 C 21

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Supreme Court may prescribe time for service and return of writ of error from City Court, 85 C 374
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§ 9. Form; Defects, Objections and Amendments

plaintiff may amend defect in writ on payment of costs, K 5
—under ancient statute the right of amendment was absolute, K 5
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 defect in obtaining jurisdiction not waived by answering to merits after plea to jurisdiction overruled; but otherwise where defendant seeks affirmative relief, 104 C 206
 amendment of writ does not invalidate garnishment, where no one misled or prejudiced, 105 C 640
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 that case is beyond jurisdiction of court to which returnable will not destroy right of officer to replevy goods if it may be and is transferred to proper court, 105 C 672
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 —and executor of one of parties who died after suit was brought should have been made party by writ of scire facias, 117 C 631
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 the granting of a motion to amend does not in itself constitute an amendment, 117 C 638
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PROHIBITION

will not lie against county commissioners de revocation of liquor license, 49 C 598, 50 C 324
 whatever jurisdiction Superior Court or its judge has over inferior courts is by virtue of statute de writ of prohibition, 61 C 439
 under statute, the granting or refusal of a writ of prohibition depends upon proof and sufficiency of the facts, not upon discretion, 61 C 439
 is an extraordinary writ and great care should always be exercised, 61 C 440

judgment dismissing an application for writ of prohibition is a final judgment from which an appeal lies under statute, 61 C 440
 where insolvency proceedings under statute were withdrawn on arrangement with debtor, and other creditors attempted to intervene under another statute, *held* a writ of prohibition would lie to restrain further action of Probate Court, 61 C 442
 —creditors having no right to intervene under statute, after withdrawal of case, 61 C 442

Prohibition

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- of writ in general; may issue to inferior court which clearly exceeds its jurisdiction, 68 C 543
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- where motion for dissolution of injunction is easy and proper remedy, writ refused, 72 C 458
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- one has no right to remove family having smallpox to unoccupied house of another, 42 C 158
- unless by consent of owner or authority of town board of health, 42 C 158
- although removal is necessary to prevent spread of disease, 42 C 158
- town board of health *held* not liable in damages when acting in good faith under statute, and doing no unnecessary damage, 51 C 81
- no distinction between nuisances and filth under statute, 51 C 98
- the board is same although its members may be different at times, 51 C 81
- may remove filth and nuisances not endangering life and health at time of removal, 51 C 102
- not liable for error of judgment while acting in good faith, 51 C 80
- statute de powers of board of health is constitutional, 51 C 81
- ordinance forbidding boating and fishing on Shuttle Meadow Lake *held* valid exercise of police power, 55 C 384
- city ordinance requiring physicians to report infectious disease, without compensation, is constitutional, 56 C 216

- apart from consideration of public health, an association owning land may use it for private cemetery, though within the prohibition of statute as to location, 58 C 91
- health officers may adopt suitable measures of prevention, although no case of disease has appeared, 65 C 189
- health officers; see generally, 74 C 695, 76 C 160
- statute requires appointment of single official by method pointed out, 74 C 695
- liability of town for expense of quarantine, 76 C 160
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- protection of public health is legitimate exercise of State's police power, 86 C 677
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- judicial notice taken that scarlet fever and scarlatina are contagious, 86 C 677
- health officer must have reasonable belief of existence of infectious disease, and mere fact of exposure does not warrant conviction for violation of quarantine, 86 C 677

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PUBLIC OFFICERS

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public officers having money in their hands to which others are entitled, not subject to garnishment, 123 C 391

—modification of rule: ordinary debt due from town, money collected on execution by sheriff, salary due from school district to teacher, 123 C 391, 392

presumed to have done duty until contrary appears; to give rise to presumption there must be duty upon public officers to act in certain way, 127 C 228

conditions justifying indemnification of a public officer for a loss incurred in discharge of his official duties, 129 C 186

§ 9. Officers for Service of Civil Process

§ 10. —In General; Rights and Powers

sheriff may depute an inhabitant of town to serve the execution where town fails to pay state tax, K 239

officer is not disqualified by mere judicial disqualification, K 240

city sheriff of Norwich may serve all writs in the city directed to him, 1 R 552

plaintiff not liable for injury by officer to which he is not privy, 2 R 346

entitled to indemnity for acts directed, and apparently legal, 4 D 226

body of debtor may be levied on if personal property is not turned out on demand, 4 D 376

sheriff may retake escaping prisoner outside of his county, 5 D 249

officer may release the body and attach personal estate, 1 C 258

testimony of officer not admissible to change his return on execution, 3 C 528

promise of debtor to pay officer a commission on the debt as having been secured and satisfied by him *held* void, where creditor personally settled case, 4 C 272

cannot be purchaser at an execution sale conducted by him, unless by consent of debtor and creditor, 5 C 475

presumed to have done his duty until the contrary appears, 8 C 134

may recover for a trespass upon goods attached, though exonerated from liability by attaching creditor, 15 C 267

officer attaching goods subject to lien for freight by paying the freight is subrogated to rights of carrier, 16 C 71

may levy on land if debtor refuses to turn out personalty, 19 C 96

county commissioners have no power to take from sheriff supervision and control of workhouse, under guise of appointing an assistant to deputy sheriff, 25 C 103

sheriff may be factorized, 28 C 103

deputy sheriff is by statute substantially an independent officer, 30 C 351, 33 C 109

when attached property taken away by third person, officer can recover only on ground of his own liability, 37 C 588

peaceable entry to attach, without force, through opened door, *held* lawful, 43 C 528

cannot authorize another to perform official act required of officer himself, 49 C 249

—where officer's clerk signed officer's name on copy left with defendant, service void, 49 C 249

attorney personally liable to officer for fees for serving writs, 49 C 342

under insolvent act, officer is bound to attach real estate if sufficient to satisfy claim, 50 C 317

§ 10 Public Officers

officer selling property and dividing proceeds under an agreement between creditors; *held* that he acted unofficially and was not limited to statutory fees, 54 C 5

an officer taking possession and putting keeper in charge of property attached, need not move property, 62 C 542

—nor give reasons in return for not moving, 62 C 542

liability of plaintiff and his attorney to officer attaching or levying on property, 72 C 238

—failure of officer to inform them of claim on property, no defense to his action, 72 C 238

failure to deliver to officer goods attached but later gone out of his possession not obstruction of process, 74 C 64

nature of obligation to pay fees of officer serving process, 74 C 245

process must be directed to known public officer who has power to serve it; cases when it can be delegated to another, 83 C 274

where officer does not make good service of replevin writ, conditional vendor may justify his possession on ground that official was his agent, 87 C 369

an attaching officer is not to divulge information to opponent's counsel, 93 C 107

statement by a sheriff to defendant's attorney as to when writ had been served is within his implied authority and is not hearsay, 107 C 491

sheriff is entitled to hold prisoner under execution, upon the body, regular in form though in fact improper, 116 C 22

where attorney directed officer to attach property and on replevin by conditional vendor directed him to refuse to surrender it there was legal inference of promise by attorney to reimburse officer for loss, 128 C 420

§ 11. —Duties and Liabilities

may be sued where, for failure to return execution, K 113

officer is not liable for loss due to instructions of plaintiff, K 374

may be sued out of county for official neglect within it, 1 R 91

—and before court other than that which issued the execution, 1 R 91

sheriff not obliged to retake escaped prisoner; may look to bond, 1 R 128

not liable for failure to return in time, if execution is afterwards satisfied and returned, unless special damage is alleged, 1 R 264

not liable for money collected on execution until demand, 1 R 303

liable at common law for neglect in final process, 2 R 251

immediate departure of debtor after taking poor debtor's oath is a voluntary escape for which he and sheriff are liable, 2 R 281, 3 C 423

officer having opportunity to levy execution and failing to do so is liable for neglect, 1 D 128

return to house of clerk *held* sufficient; not liable for neglect of clerk to docket same, 2 D 480

subsequent omission or neglect cannot make levy a trespass ab initio, 4 D 257, 56 C 322

—such subsequent act must be itself a trespass, 4 D 257

extent of liability of officer for neglect of duty, 5 D 37

liability of sheriff for escape of debtor from jail placed upon grounds of public policy, 5 D 37

what damages are recoverable for failure to return execution, and for false return, 5 D 221

order enlarging jail limits *held* justification for escape, when, 5 D 506

liable at common law, for neglect of official duty, 1 C 347

omission to levy *held* not justified by promise of creditor to forbear, 2 C 417

voluntary return of a prisoner is equivalent to recaption, and if before action is brought excuses sheriff, 2 C 473

—detention by creditor, to prevent return of escaped prisoner, excuses the sheriff, 2 C 473

rule of damages for prisoner's escape is the amount of execution with interest from time of escape, 3 C 423, 8 C 63

judgment against deputy, without satisfaction, *held* no bar to suit against sheriff, 4 C 387

direction to officer to take specific articles does not limit his search to these articles, nor excuse neglect of official duty, 4 C 527

not answerable for deficiency in proceeds of sale, except for neglect and bad faith, 5 C 475

liability of officer for money paid on execution on judgment afterward reversed, 6 C 372

liable for the levy of an execution issued without authority; *aliter*, if merely erroneously issued, 7 C 11

in action against him for defective levy on land, sheriff may show debtor's want of title, 9 C 42

duty or liability of sheriff not affected by his knowledge, if process is regular, 9 C 141

justified by process valid on its face, 9 C 141, 30 C 580, 43 C 24

—so by replevin writ where defendant's name is omitted in summons clause, if he take the goods from possession of the defendant named, 43 C 24

—though such possession be under sheriff, and goods are attached and belong to third person, 43 C 24

—and though officer's assistant knew such fact, 43 C 24

- distinction between liability for failure to return mesne process and failure to return execution, 9 C 216
- rule of damages for neglect in serving mesne process, 9 C 379, 10 C 1, 16 C 555
- duty of jury to assess, 16 C 555
- money collected on execution and not paid over, not to be included, 16 C 555
- must serve writs in order of delivery, 15 C 46
- must use reasonable diligence, in absence of instructions, 15 C 46
- time spent in negotiating settlement, to be excluded in ascertaining due diligence, 15 C 46
- liable for loss from failure to serve writ immediately if so directed, 15 C 46
- cannot justify sale of exempt property by virtue of process, 16 C 144
- nor for acts contrary to duty, without consent, though such acts be beneficial, 16 C 543
- inconvenience of removal is no excuse for not selling at post, 16 C 536
- liable for attaching, if not subsequently complying with all legal requirements, 16 C 536
- unless legal excuse shown, liable to owner and to those for whom he acts, 16 C 536
- not liable for not attaching real estate, unless so directed, 16 C 555
- is not protected by process disclosing on its face want of issuing authority, 18 C 13
- not chargeable with neglect if acting under creditor's directions, 19 C 99
- statute against demanding illegal fees is penal; applies only in civil process, 23 C 238
- action for escape of prisoner from custody of defendant, a constable, who had attached his body on mesne process, 25 C 499
- is not protected by process unless it is returned to court, 25 C 568
- duty of sheriff on discovering that writ is issued without authority, 25 C 568
- failure to return writ makes officer attaching thereon a trespasser ab initio and liable for actual damage, 25 C 568
- not liable for neglect to serve, until actual damage results, 26 C 324
- same rule applies for false return, 26 C 324
- rule the same in mesne and final process, 26 C 324
- onus of proving damage, or lack of it, in each case, 26 C 334
- not liable in trespass for a sale under decree of court on invalid mortgage, 28 C 513
- claim founded on tort of deputy may be presented against estate of deceased sheriff, 30 C 351, 33 C 109
- in absence of instructions may presume execution was issued on day of judgment, 31 C 578
- not liable for delay, if execution had less time to run, and no notice was given, though he knew debtor was insolvent, 31 C 578
- liability of sheriff for acts of deputy, how limited, 33 C 109
- claims against his estate barred if not presented in time limited, 33 C 109
- liability of receptor, 33 C 184, 36 C 466
- party assisting officer de facto in service of valid process will be protected, 46 C 218
- though legally elected officer had not given bond, 46 C 218
- though assistant in the seizure was one of the complainants, 46 C 218
- nonreturn of writ by agreement with defendant is not available in favor of third person, 46 C 389
- if he make no demand until goods are out of the possession of sheriff, 46 C 389
- to justify taking of goods, officer must show compliance with every legal step, 46 C 390
- or show a legal excuse for not doing so, 46 C 390
- expiration of term does not excuse failure to deliver property attached, 48 C 131
- phraseology of bond *held* coextensive with duties of sheriff, 48 C 131
- presumed to have made attachment to amount directed in writ, 48 C 138
- officer cannot use force merely to identify person to be served, 49 C 67
- such person cannot lawfully obstruct or resist officer, 49 C 67
- officer liable for charging excessive fees on tax warrant, 50 C 77
- action against sheriff for default on execution of foreign attachment accrues at end of sixty days, 50 C 526
- and not at date of judgment against plaintiff on scire facias afterwards brought against garnishee, 50 C 526
- officer attaching property under original writ is liable for default, on a copy substituted for original lost, 56 C 568
- burden is on officer selling property after attachment is dissolved by insolvency, to show no knowledge of insolvency, 62 C 311
- though trustee alleged knowledge in officer in his complaint, 62 C 311
- taking goods of A on writ against B is breach of bond condition, for which sureties are liable, 68 C 1
- liability of officer for escape and failure to return process, 70 C 143
- officer making wrongful attachment is jointly liable with plaintiff directing it, 70 C 341
- officer serving writ becomes trespasser unless he returns it, 72 C 338
- statutory penalty for taking illegal fees for service of process, 74 C 241

§ 11 Public Officers

- officer acting unlawfully, as in attachment of exempt property, is liable, 75 C 104
- officer who, in good faith, dispossesses one under execution issued on judgment satisfied but not discharged, or issued after death of judgment creditor, is protected, 79 C 682
- conduct of sheriff in removing furniture from house under execution in summary process, *held* reasonable and proper, 106 C 387, 114 C 432
- deputy sheriff guilty of conversion by seizure of property exempt from attachment, 121 C 423
- failure of plaintiff to make claim that articles were exempt at time of attachment did not give rise to estoppel, 121 C 423
- if warrant issues from magistrate or officer of special and limited powers who has not jurisdiction of person, subject matter and process, all who are voluntarily and actively engaged in its procurement and execution are trespassers, 129 C 545
 - when such judge acts judicially in matter of which he has general jurisdiction but has acquired no jurisdiction of person affected, he is not liable if colorable case has been presented which calls for exercise of his judgment and he has acted in good faith, 129 C 545
 - so where notice of hearing and administering poor debtor's oath did not comply with statute but there was colorable basis for decision of justice that he had jurisdiction of plaintiff judgment creditor, he was not liable for releasing debtor, 129 C 546
 - failure to wait full hour after time fixed before administering oath, if error, was one in exercise of jurisdiction and would not make his action void or himself liable, 129 C 550
- where court or magistrate has general jurisdiction and want of jurisdiction depends on matters of fact, officer who serves process is protected if process is valid on its face, 129 C 545
 - such validity not determined on basis of scrutiny by trained legal mind nor is it to be judged in light of facts outside its provisions which officer may know, 129 C 545
 - unless there is clear absence of jurisdiction on part of court or magistrate issuing process, sufficient if it appears valid in judgment of ordinarily intelligent layman, 129 C 546
- want of jurisdiction of justice to administer poor debtor's oath due to failure to make proper service not so clear as in itself to deprive deputy jailer of protection in releasing debtor under certificate of justice discharging him, 129 C 546
 - though certificate contained untrue statements and instead of reciting proper service referred to officer's return for date of serv-

ice, deputy jailer could regard it as valid, fortified as it was by action of the justice, 129 C 546

- while certificate was not a process it afforded officer a like protection, 129 C 551
- if officer acts under process issued by a court or magistrate who as matter of law is clearly without jurisdiction, liability might attach, 129 C 551

§ 12. Police Officers; Criminal Process

- sheriff is not liable to arrest on mesne process, K 48
- sheriff cannot give bail for person arrested by him, K 209
- sheriff liable for allowing prisoner to go at large without sufficient bail, K 209
- arrest without warrant, to prevent breach of peace or escape, proper, 1 R 67
- officer may break open door, though person is not in the house, if officer had good reason to suppose he was, 1 R 84
- officer may break open door to make arrest, when, 1 R 134
- sheriff may take bail and release prisoner in criminal case, 2 D 1
- sheriff may take instrument not under seal, as security against escape, 8 C 63
- failure of de facto constable to give bonds is of no avail to defendant, when, 25 C 278
- duty of officer after arresting debtor on mesne process, 25 C 508
- officer having legally served valid warrant not affected by subsequent omission of magistrate, 27 C 447
- facts *held* insufficient to authorize arrest without warrant, 37 C 32
- policemen are officers of the law and have no contractual relation with the city, 45 C 191
- sheriff having made lawful arrest, is presumed to have done his entire duty, 51 C 432
 - presumed to have presented defendant before proper court or magistrate, 51 C 432
- officer neglecting to return warrant is a trespasser ab initio, 56 C 320
 - but one assisting officer at his request is not thereby a trespasser, 56 C 320
- sheriff is proper defendant in habeas corpus to release prisoner held on mittimus, 60 C 426
- nature of office of policemen, 67 C 310, 70 C 121, 94 C 411
- liability of officer for arrest due to his failure to sign return on subpoena, 68 C 392
- control of jailer over prisoner awaiting trial; responsible for safekeeping, 72 C 728
- officer who joins justice in answer to charge of false imprisonment stands or falls with him, 75 C 350
- municipal board does not sit as a court in hearing charges against a policeman; hearing is informal, 82 C 43

authority of policeman to arrest without warrant for misdemeanor is conferred and limited by statute, 84 C 164

power of police officer to arrest without warrant, 84 C 164

charter provision permitted police captain to accept cash as bail after amount fixed; acting captain can accept such sum; has no power to allow bail and fix amount, 89 C 298

property can be seized by an officer without warrant when being used in violation of law, or on speedy information of others, 90 C 584

officer, acting under warrant regular on its face, is protected, 91 C 513

policeman's action in making arrest is judged by the facts as they appeared to him at the time, using the discretion of an ordinarily discreet and prudent person, 93 C 475

notice to city, by observation of a policeman that a walk is likely to be slippery, is not notice of its icy condition, 93 C 622

owner of goods stolen or any other person may retake them and tender thief to justice, 97 C 133

thief resisting arrest is guilty of breach of the peace and may be arrested by anyone, 97 C 138

duty of policeman to seize implements of lawbreaking and articles to be used as evidence, 97 C 543

duty of policeman to arrest one violating law in his presence, 97 C 543

policemen not required to return articles held by them for evidence, 97 C 543

in arresting one for intoxication policeman acts within own field of observation and at his peril, 97 C 695

search and seizure by police officer without warrant; arrest without warrant, 101 C 224

presumption that police officer making search in liquor case acted properly, 101 C 231

officer must carry out commands of warrant literally unless prevented by emergency, 105 C 177

liability for abuse of process, 105 C 177

intent of police officer in wielding club is a fact and he may testify as to it, 105 C 528

officer may use no more force than reasonably necessary, 105 C 528

police officer may not give opinion as to whether he used more force than necessary in making arrest, 105 C 528

duty of motorcycle policeman in patrolling highways as to care to be used, 108 C 180

—effect of statutory exemptions, 108 C 182

not liable to garnishment for personal property held as evidence, 109 C 316

—whether property taken from room or person, as evidence of specific crime for

which arrest made or of another crime for which he is charged, 109 C 316

—basis of rule is public policy, 109 C 316

—not applied where property no longer needed or need is so remote or improbable as not to justify detention, 109 C 316

—power of court to determine disposal of such property, 109 C 316

—after order for return to owner, it may be garnishable, 109 C 321

—property cannot be held indefinitely unless capable of only unlawful use, 109 C 321

statements made to officers induced by promise of favor in respect to prosecution inadmissible, 110 C 549

right of officers finding law being violated to seize implements and evidence of violations, as liquor, glasses, etc., 112 C 174

—to enter and search other rooms of dwelling than that where crime was being committed, 112 C 175

—things seized though not in fact used in evidence are in custodia legis, 112 C 176

—effect of delay in condemnation, 112 C 179

right of police officer to arrest without warrant, 115 C 279

officer cannot arrest fugitive from justice without warrant though at request of officers of demanding State, 115 C 638

sheriff's liability for escape of prisoner committed on body execution; jail liberties bond, 116 C 22

court should have embodied in judgment conclusion that civil service classification which provided for "police sergeants" but not "detective sergeants" did not abolish latter office, 125 C 344

liability of private person or corporation for acts of special police officers, paid for by it, 125 C 705

§ 13. Town and City Officers

See also MUNICIPAL CORPORATIONS, §§ 7, 11, 12, 20; SCHOOLS AND SCHOOL DISTRICTS

constable chosen and sworn and rechosen the next year may act, although not resworn, 1 R 83

an annual officer usually continues until superseded by another, 1 R 83, 6 C 437

constable can be chosen only at the time or under the conditions prescribed by statute, 1 R 136

town meeting may fill vacancy in elective office on removal from the town, 19 C 334

it is the duty of town to appoint assessors, 22 C 163

constable qualified except as to bond is de facto officer, 25 C 282, 46 C 219

town clerk's record that meeting was legally warned is prima facie evidence thereof, 25 C 556

§ 13 Public Officers

- acceptance of office of constable is a surrender of that of justice, 25 C 565
- whether election of one officer is legal, when law requires election of a board of officers, *quaere*, 32 C 108
- duties of salaried collector on leaving office, 47 C 340
- mandamus* lies against negligent collector, notwithstanding there is a remedy on the bond or by execution, 48 C 145
- town treasurer as such merely, has no authority to borrow money for town, 49 C 539
- or to bind the town by his official note for its repayment, 49 C 539
- town treasurers made agents of State under statutes de payment of state bounty, 50 C 522
- and they personally, and not the town, are responsible for money received and not paid over, 50 C 522
- town is not estopped by erroneous record of town clerk, as against one acting under it, 51 C 22
- office of mayor is not recognized by Constitution of Connecticut, 51 C 125
- collector cannot, on suit for money collected, set off claim for salary for other years, 51 C 171
- assessors not officers of local police within Art. X, § 2, Constitution of Connecticut, 52 C 214
- police, defined, 52 C 215
- same as to members of school committee, 59 C 60
- police commissioners of the city of New Haven are agents of the State, engaged in performing public and governmental duties, 53 C 214
- cannot oblige city to pay for rooms hired for voting places for national and state elections, 53 C 214
- mandamus* lies against public officer to compel performance of a public duty, 54 C 275
- authority of town agents limited by express language in which it is conferred, 55 C 414
- persons dealing with towns through agents must, at their peril, take notice of the powers of the agents, 55 C 414
- statute de punishment for exceeding appropriation, applies only to specific appropriation for particular purpose, 58 C 451
- election of officers of borough *held* not to be vitiated by registry list informally prepared, 60 C 23
- there is no statute which provides for any such officer as a town agent, 60 C 164
- or any that defines any duty to be performed by such an officer, 60 C 164
- municipality may indemnify its officers for loss incurred in performance of their duties, when, 60 C 230
- collector who fails to collect and pay over the taxes may without trial be committed to jail, as on execution after judgment, 65 C 30
- duty of municipality is duty of officer who should attend to its performance, 68 C 22
- each member of committee has equal power; removal by one of lock placed on school-house by another, 71 C 737
- tax collector liable for misappropriation as “town officer or agent,” 73 C 95
- street commissioners; what is “notice” of order by, 73 C 327
- powers as to unlawful construction of street railway, 73 C 336
- corporation may sue officer who violates charter provision as to deposit of funds, 75 C 145
- duty of treasurer, under charter, to deposit funds in bank is ministerial, not discretionary, 75 C 146
- inference of waiver by city cannot be based on knowledge of another officer of treasurer’s failure to deposit, 75 C 146
- town agent; power over lands, 78 C 109
- registrar not liable to assistant whom he has employed for services unless he clearly binds himself, 78 C 670
- power of city to defend or indemnify officer who has acted under authority of law, 79 C 237
- moderator of meeting not liable for decision made in good faith, 79 C 676
- municipal officers, in controlling use of street by railway, are officers of State; powers, 80 C 623
- corporation counsel *held* to have power to determine whether city had any defense, or would defend, against claim, 81 C 229
- a police commissioner acts improperly if he peddles votes within prohibited distance of the polling place, 81 C 586
- a city board is not relieved of fraudulent conduct of a city officer to whom they have intrusted a matter because they did not know of it, 82 C 623
- one dealing with municipal committee is bound with knowledge of its powers, 83 C 41
- requirement that member of school committee be “resident” construed, 83 C 560
- statute de officer selling to institution in which he serves except through open competition, *held* not to apply to school districts, 85 C 23
- town cannot control its officers when acting as agents of the law, 88 C 308
- agent of a town only has the authority conferred by statute or town vote; no implied authority, 92 C 412
- liability of town officers for removal of shade trees, 94 C 435

one member of board of selectmen cannot bind others as regards acts outside its legal functions, 94 C 435

referendum not applicable to removal of town manager by council, 97 C 583

liability of officers for injury due to blowing down wall with dynamite where they acted without authority, 98 C 58

one dealing with municipal officer or agent in governmental matter bound to know limits of his authority, 102 C 206

—such officers have no implied powers except such as are necessary to carry out those expressly given, 102 C 214

effect of provision as to registrars of voters being of different political parties, 102 C 605

—party may spring up and exist for only one election, 102 C 607

—hence evidence as to party organizations before and after election may be irrelevant, 102 C 600

requirement that member of New Haven finance board be a “resident elector”; *held* to require actual residence in city, not a mere voting domicil, 103 C 157

members of town school committees are officers of the towns, 103 C 422

presumption that officials made proper assessment against particular person from proof of perfected assessment list of town, 107 C 133

officers or agents without authority to contract other than in conformity with town vote, 111 C 510

—cannot contract in excess of appropriation, 111 C 510

one dealing with officers of town is charged with knowledge of limitation upon their authority, 111 C 515

—but where they are restricted to having work done not exceeding certain appropriation, and only officers of town know expenditures chargeable against it, contractor not bound to know when it is exceeded, 111 C 516

statute requiring clerk to check caucus nominees with voting list is not one dealing with qualifications of town officials, 114 C 530

city treasurer not liable for payments made in good faith on checks issued by proper authorities and in conformity with charter, in taxpayer’s action, 116 C 9

—not required at his peril to inquire into legality of orders, 116 C 9

in interest of State and public that statutes de taxation be strictly construed and accurately complied with by officers of municipalities, 117 C 305

assistant city clerk cannot waive compliance with statute requiring notice of highway defect or estop city from taking advantage of that failure, 117 C 398

defendant, member of board of education, charged with receiving gratuities from coal company from which board purchased fuel for schools, 121 C 160

—as defendant did not himself make the contracts, he was not within first portion of statute, 121 C 160

—nor within scope of statute penalizing member of board of management “of public or private institution or corporation” for accepting gratuity from one with whom board makes contract, 121 C 160

right of mayor to appoint an officer or employee cannot be implied from the mere fact that he is chief executive officer of city, 124 C 129

provision for regulation of number and kinds of subordinate positions and fixing of compensation by some authority other than immediate superior, is common in city charters, 124 C 129

—does not, of itself, carry with it power of appointment to those positions, 124 C 129

ordinarily, unless otherwise provided, expressly conferred power to perform a municipal function carries with it authority to appoint such assistants as are necessary, 124 C 129

corollary to principle that municipal officers whose authority is defined by law have no implied powers except such as are necessary to carry into effect their express powers, is that they have such implied authority as is necessary thereto, 124 C 129

subordinate assistants to heads of executive departments and commissions are not officers but a mere employment or agency resting on contract, 124 C 136

statute prescribing duties of driver approaching intersecting highway, provided signs legible for one hundred feet indicate such intersection, places no duty on traffic authorities to erect sign of any particular type or legibility, 127 C 228

where commissioner of police restricted capacity of open-air theater to three hundred because city’s counsel ruled it was a building within code, and subsequently court held it was not building, proper for him to change decision, 128 C 21

offer of assistant corporation counsel to reduce defendant’s assessment was not a legal offer without precedent authority or subsequent ratification by city, and there was no authority in charter, 128 C 224

—his authority could not be proved by his own declarations as agent, 128 C 224

—parties charged with notice of extent of his authority, he being agent of municipality, 128 C 228

mayor by act of 1927 has broad discretion in acting upon applications for certificates of approval of locations for gasoline stations, 128 C 261

§ 13 Public Officers

tax collectors are elected officers and cannot authorize agent to take over matters involving exercise of discretionary powers, 128 C 552

—statutory power given state banks to act as agents for tax collectors contains necessary implication that their authority applies only to ministerial acts, 128 C 552

—such bank has power as agent to sign and file certificates continuing tax liens, a ministerial act, 128 C 552

—in absence of evidence that a discretion whether or not to file the liens was reposed in the bank, § 45 of Practice Book (1934) controlling, 128 C 552

assistant tax collector of Bridgeport not an executive office or position within provision of Civil Service Act placing in unclassified service "all executive offices or positions," 128 C 585

members of board were acting in discharge of duty imposed by law in matter in which town had interest in defending libel suit brought against them because of letter explaining reasons for failing to rehire superintendent, 129 C 186

—injunction to restrain town from paying their counsel fees properly denied, 129 C 187

§ 14. State, Federal and Miscellaneous Officers

See also STATE; UNITED STATES

commissary if known to vendor as public agent is not liable for goods bought for public use, 1 R 89

United States marshal may be imprisoned on civil process, 2 D 300, 304

after removal, collector of customs not entitled to commission on goods bonded by him while in office, 2 D 431

committee under County Court while acting bona fide are not personally liable, 10 C 329

marshal cannot bind government by contracts concerning vessels in his possession, 30 C 21

—held personally liable on promise to pay for examining alleged slaver for evidence, 30 C 21

woman may be appointed commissioner of Superior Court, 50 C 136

duties of coroner under statute are of a judicial nature, 55 C 588

finding of coroner and verdicts of coroner's juries are matters of record, 55 C 588

—when lodged with clerk of Superior Court are open to all persons interested, 55 C 579

—the court, coroner and clerk have no discretion in this matter, 55 C 579

inquest of coroner is not a judicial examination of one accused of crime, 56 C 414

—accused not compelled to testify at inquest, 56 C 414

under Art. IV, § 19, Constitution of Connecticut, comptroller may exercise his discretion in settlement of an unliquidated claim, 61 C 553

—but where the law fixes the amount, time, manner and payee, the act is purely ministerial, 61 C 553

—in such case mandamus lies, 61 C 553

—payment of school money is not dependent upon specific appropriation, 61 C 553

one whose duty it is to restrain insane persons, not liable therefor; is agent of the law, 70 C 257

clerks of General Assembly proper custodians of its files during sessions, 77 C 262

payment of gratuities upon order of the Senate, registered on books of the comptroller, 85 C 657

appointment of state treasurer to enforce bonds given to protect customers of private bank, 95 C 10

state's attorney is a high public official; conduct in trial of a case must be firm but fair, 96 C 160

assistant state's attorney authorized to sign writ in certain contingencies is assumed to have acted lawfully, 99 C 217

water company not liable for damage resulting from order of health officer as to use of private lands in watershed made of his own accord, though his attention was called to the situation by company's superintendent, 100 C 459

no presumption that agent of United States war department performed his duty to see channel of stream left clear after bridge construction, 104 C 382

motor vehicle commissioner presumed to have complied with statute in issuing certificate of registration under trade name, 106 C 254

presumption that motor vehicle commissioner did his duty in satisfying himself as to legal age of applicant for license, 107 C 215

majority of appraisers of mortgaged property can act if all have been legally notified, 107 C 272, 111 C 490

majority of distributors of testate estate may act if all have notice of meeting, 111 C 589

highway commissioner cannot be sued in his official capacity for illegal entry upon land, 113 C 660

in bringing matter of award of damages for taking of land into court, highway commissioner was representative of State and his acts are in effect its acts, 129 C 113

§ 15. De Facto Officers

what constitutes, 6 C 435, 17 C 588, 36 C 449, 38 C 449

acts of de facto officer valid as to public and third persons, 17 C 573, 585, 19 C 492, 25 C 283

—title of de facto officer or validity of acts as such, cannot be indirectly called in question, 17 C 589

—applies to judicial as well as to ministerial officers, 17 C 589

—certain acts of grand juror, *held* valid as done by de facto officer, 17 C 589

—a review of the cases, 17 C 590

right of one acting *colore officii* cannot be tried collaterally, 19 C 489

—is as well qualified to act while in office as if legally appointed, 19 C 498

failure of de facto constable to give bonds, *held* of no avail to defendant, 25 C 283

appraisers for damages of layout of new street are public officers; acts as de facto officers, *held* binding, 32 C 452

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—so a judge appointed by common council under act of Legislature, 36 C 432

four classes of de facto officers whose acts are valid, 38 C 449

color of appointment necessary if officer is assailed directly for his acts, 38 C 449

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acts of public officer appointed by an unconstitutional law, before validity is decided, are valid, 38 C 449

—so acts of a justice of peace called in to act as judge of City Court, 38 C 449

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—right to salary depends on legal appointment, 40 C 310

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—incumbent should be ousted, before mandamus lies to compel an election, 44 C 318
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—although legally elected officer had not given bonds, 46 C 218

—and though assistant in the seizure was complainant, 46 C 219

duties of de facto officer *held* determined by the ordinance defining them, 46 C 480

—cannot be affected by vote of board, 46 C 480

if charter authorize removal for cause only, board cannot appoint another during term, 46 C 481

—an officer so elected and acting after term of legal incumbent is a de facto officer, 46 C 484

where both houses of the General Assembly failed to concur in the declaration of Governor, *held*, on quo warranto, there was no legal election, 61 C 360

—and the incumbent remained Governor de jure as well as de facto under Art. I, § 4, and Amendment XXVII, Constitution of Connecticut, 61 C 360

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PUBLIC POLICY

- § 1. IN GENERAL
2. CONTRACTS
3. MISCELLANEOUS CASES

See also CHAMPERTY AND MAINTENANCE; CHARITIES;
DEEDS § 14; MARRIAGE

§ 1. In General

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avoidance of litigation by compromise adjustments always favored, 117 C 147

—policy of law to discourage not to encourage resort to litigation, 117 C 147

—settlement of part of multiple claims under liability policy not preference and opposed to public policy, 117 C 147

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§ 2. Contracts

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note given in whole or in part to suppress inquiry into offense is void, 21 C 432

—aliter, if freely given to satisfy private damages, 21 C 432

note given as condition to obtaining legislative divorce *held* not void, 22 C 632

—Legislature may divorce on such terms as it sees fit, 22 C 633

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—not necessary that offense compounded be a felony, 47 C 223

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bond to save town harmless if it would not institute "legal proceedings" against obligor for bastardy, 54 C 419

—*held*, that "proceedings" referred to were and must be civil and not criminal, 54 C 424

—and contract *held* not void as against public policy, 54 C 419

mere fact that contract grows out of transaction on Sunday will not render it void, 58 C 395

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—not determined by actual results of a contract, but by what it threatens; its evil tendencies and possibilities of harm, 86 C 641

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public policy not opposed to a limited restrictive agreement as to engagement in business, 87 C 23

public policy not opposed to contracts to facilitate divorce, 87 C 377

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contract by corporation to buy its stock from one of its stockholders at price he paid for it if corporation is not successful as against public policy, 101 C 539

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restraints upon alienation as opposed to public policy, 105 C 261

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agreement not to extradite fugitive from justice void as against public policy, 105 C 375

agreement that conveyance of real estate shall be rescinded unless grantee can secure judgment releasing restrictions is not opposed to public policy, and grantee may maintain action, 106 C 66

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nothing opposed to public policy in purchasing land with intention of enforcing restriction to preserve object of scenic attraction, 115 C 70

restriction upon conduct of certain business upon land for a reasonable purpose and period not against public policy, 115 C 122

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of divorce proceedings already begun or decided upon, not necessarily contrary to public policy unless concealed from court, 119 C 612, 121 C 281

contract between employees' committee and trolley company not unfair or illegal as to plaintiff employees, 119 C 622

conveyance from husband to wife in view of divorce proceedings independently started, 123 C 564

considerations affecting validity of restrictive contracts on grounds of public policy; injury to public by being deprived of party's industry; injury to party by being precluded from occupation, 125 C 1

in a refinancing, *held* that Home Owners' Loan Association took first mortgage with imputed knowledge that a second mortgage was to be given to M, and latter mortgage was not invalid as against public policy, 126 C 132

contract between husband and wife in settlement of property affairs in view of divorce proceedings, not necessarily contrary to public policy and void, unless concealed from court, 127 C 514

conditional sale contract which is part of general scheme to defraud creditors is unlawful and against public policy, 128 C 200

sale of interest in property to which right to sue is an incident not violative of public policy, 129 C 365

—nor for person to aid in maintenance of action where he has real interest in it not acquired by agreement to render such aid, 129 C 366

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prohibiting amusements near grounds of agricultural societies, 77 C 135

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public policy prevents broker's acting for both parties, 81 C 570

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public policy not opposed to transfer of bare legal title of stock and retention of equitable interest, 87 C 601

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public policy permits a limit on taxation of outlying wards of a city that are annexed to it, 88 C 480

§ 3 Public Policy

unless our public policy forbids, full recognition is given to decrees of divorce granted by other States, 88 C 689

California statute recognizing illegitimate children will be followed by our courts as not against our public policy, 90 C 164

entering a prize contest to increase circulation of a paper with knowledge that it is a fraud on the public is against public policy, but one can repudiate it and recover money, 91 C 372

a foreign decree of separation when against nonresident, nonappearing defendant not served with process has no effect here as a matter of public policy, 91 C 608

provisions for forfeiture of legacy, if legatee contests will, are not favored, 92 C 168

refusal to pay tax to test its constitutionality is opposed to public policy; should pay under protest, 92 C 199

not opposed to public policy to require beneficiary to give up use of liquor and tobacco, 92 C 508

—against public policy where made dependent upon conduct of beneficiaries' husbands, 92 C 508

holding of baby show, if dangerous to public health, is against public policy, 92 C 621

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public policy as affecting liability of charitable corporation to individual for tortious acts of its servants, 113 C 188

right of adopted child to inherit from natural parents; child coming from another State where adoption statute does not take away right, 115 C 163

common-law right of State to preference in payments of debts due it from insolvent except as abrogated by statute, 115 C 393

public policy favors and justifies protection of governmental funds against loss by default of depository, 115 C 393

insurance companies not so charged with public interest as to impose upon them peculiar duty to protect interests of those who apply to them for insurance, 116 C 526

—to hold that because they enjoy franchise, duties are imposed on them which have no

sanction at law would introduce chaos, 116 C 526

—and would reach into field of other specially chartered businesses, such as banks, utilities and the like, 116 C 526

—public interest more requires that stability necessary to guard those who enter into relations with these companies, 116 C 526

considerations of public policy do not require rule making restaurant keeper liable as insurer of wholesomeness of food served, 117 C 133

it is a rule of public policy that master is liable for acts of servant done in execution of former's business, though servant's acts were unauthorized and contrary to instructions, 119 C 216

nothing in public policy forbidding husband from bringing action against wife to adjust property rights between them, particularly after they are separated, 120 C 528

activities of Connecticut Milk Producers' Association, a legally organized co-operative marketing corporation, not open to attack as being against public policy, 122 C 483

assignment of claim for no consideration and solely to prevent suit on it from being removed to federal court for diversity of citizenship might be violative of our public policy, 122 C 587

to permit usurer to avoid consequences of his usury by asserting ignorance of law would open door wide for evasions, 123 C 101

necessity of filing claim for taxes against estate of deceased, 123 C 352

as affecting garnishment of money due public officers, 123 C 390

—salary of mayor exempt from garnishment, 123 C 390

immunity of charitable institution for negligence and torts of agents not placed on ground of waiver but of public policy, 123 C 646

probate of every legally executed will, 124 C 96

where, to determine legality of votes, it is necessary to disclose the persons for whom a particular voter voted, public policy of secrecy yields to greater public policy, 129 C 495

action brought by parent against unemancipated minor child for personal injuries caused by negligence of latter is violative of public policy, 129 C 518

—as is suit by administratrix who is also widow of decedent, 129 C 524

—that child may have insurance, nil sig., 129 C 523

PUBLIC UTILITIES COMMISSION

- § 1. IN GENERAL
2. POWERS
3. APPEAL; FUNCTION OF COURT

NOTE: The Public Utilities Act, enacted in 1911, vested the duties and powers formerly in the railroad commissioners, together with certain new and enlarged powers, in the public utilities commission.

See also ELECTRIC LIGHT AND POWER COMPANIES; GAS COMPANIES; PUBLIC UTILITY COMPANIES; RAILROAD COMMISSIONERS; RAILROADS; STREET RAILWAYS; TELEPHONE AND TELEGRAPH COMPANIES; WATERWORKS

§ 1. In General

commission, and court on appeal, do not sit as judicial tribunals, and technical rules do not apply, 88 C 472

orders of commission are based on public convenience, necessity or safety and imply a determination on these points in the usual way, 89 C 528

Public Utilities Act is remedial; liberally construed, 89 C 528

legislative discretion cannot be delegated to an administrative tribunal, 89 C 529

Legislature prescribes primary test or standard and can leave executive duty of carrying it out to administrative tribunal, 89 C 529

a single resident can bring petition for extension of gas, but all may join, 91 C 134

extension of gas service is determined by reasonableness, not by question of immediate return, 91 C 134

commission is an administrative tribunal; defects in petition no objection to it, 91 C 135, 697

remedy to secure reasonable rates from commission is statutory form of a common-law rule, 91 C 692

right of one or several to apply for redress on ground that telephone company does not furnish adequate service at reasonable rate, 99 C 282

duty of railroad company to traveler at grade crossings to exercise reasonable care in ordinary case may be satisfied by compliance with statutes and orders of commission, but not where crossing more than ordinarily dangerous, 102 C 735

fact that commission has ordered, or not ordered, extra precautions has no bearing on duty to exercise reasonable care, 102 C 735

effect of warnings as to street crossings upon railroad's negligence in running into vehicles there, 102 C 735, 103 C 508

statute de commission remedial in character and to be liberally construed, 103 C 197

purpose of commission is to bring public service corporations under unified control and to establish general policies, 103 C 198

statutory procedure for removal of commission on citizens' petition reviewed and defined, 111 C 634

—requisites of petition, 111 C 634

—attorney general has no discretion, 111 C 634

—petition asking removal for failure to enforce grade-crossing law *held* sufficient, 111 C 634

—statute is valid, 111 C 634

—mandamus lies to compel attorney general to act on petition, 111 C 634

—right of General Assembly to determine conditions of removal of commissioners, 111 C 634

nature of application for further hearing by attorney general contesting duty to bring proceedings for removal upon petition of citizens, 112 C 586

—what facts must be shown to require action, 112 C 586

removal proceeding by attorney general on request of citizens, 112 C 586

—meaning of requirement that request shall state facts not manifestly untrue, 112 C 586

court will take judicial notice of commission's regulations, 113 C 408

by statute all orders of commission are required to be recorded and books of record are public documents, 113 C 416

—authorized to appoint a secretary, 113 C 416

relocation of highway, proposed building of underpass, closing of old highway *held* component parts of plan to eliminate grade crossing, 113 C 494

plaintiff lived three thousand feet from nearest service line with no houses between; commission's ruling that company need not furnish him service at regular rates upheld, 114 C 628

order of public utilities commission that S. N. E. Company furnish service to residents of

§ 1 Public Utilities Commission

- district of White Hills in village of Huntington sustained, 118 C 71
- loss of revenue to H Company which supplied service to Huntington not confiscatory, 118 C 71
- and H Company had no exclusive franchise in that territory, 118 C 71
- contract between S. N. E. Company and H Company de lease of equipment, use of former's lines, etc., could not excuse S. N. E. from performing its public utilities obligations, 118 C 71
- and as S. N. E. had service already in this district, and its exchange was more economical for petitioners, commission did not act illegally or arbitrarily, 118 C 71
- statutes giving commission right to regulate taxicabs do not give vehicles any rights in highway beyond those within scope of public easement, 119 C 328
- within their scope, orders of public utilities commission have force of statutes and violation of any proper order is negligence per se, 122 C 236
- meaning of "available roadway" in rule requiring motorbuses to be stopped at extreme right of it, 122 C 236
- enactment of Congress and rules of interstate commerce commission thereunder substantially the same as those of our public utilities commission concerning insurance requirements of interstate carriers *held* to have superseded the latter and rendered them inoperative, 122 C 276
- regulation of public utilities commission to have force of law must be promulgated by virtue of authority conferred by express provision of law or be by fair implication incident to or included in the authority so conferred, 122 C 288
- regulations establishing certain standards for railroads with reference to safeguards to prevent injury cannot be construed as intended to determine circumstances under which duty to exercise care arises, 126 C 473
- where rates for taxi service were adopted after agreement with certificate holders of area, all parties in interest notified of order and plaintiff at no time sought to modify it, his claim of no sufficient notice without merit, 126 C 543
- proceeding before commission to revoke a license is civil in nature, 127 C 270

§ 2. Powers

- jurisdiction attaches when parties failed to agree as to character or expense of reconstructed bridge, 88 C 471
- equitable apportionment of expense of repairing, strengthening or reconstructing bridge is quasi judicial and may be determined by public utilities commission, 88 C 471

- Legislature can determine or leave to public utilities commission to say how many tracks shall be on a bridge, 89 C 528, 537
- apportionment of cost of new highway bridge between municipality and street railway presents judicial question, for Superior Court, 89 C 537
- on question of extension of gas main, commission can consider whole area for which company is chartered, 91 C 134
- within power of commissioners to require widening of space between abutments of railroad bridge over highway, 91 C 472
- commission acts in administrative capacity in relocating streetcar tracks, 95 C 26
- which one of several applicants shall receive certificate to operate jitney route is administrative question, 97 C 453, 729
- commission has no delegated power of legislation, 97 C 733
- an administrative body; its discretion not unrestrained, 97 C 733
- nature of acts in regulating "jitney" service; law does not vest commission with arbitrary power, 97 C 735
- duty of commission and of court on appeal, 99 C 282
- commission may, of its own motion, eliminate grade crossing, 100 C 322
- or upon petition of highway commissioner, 100 C 322
- and assess portion of cost to town, 100 C 322
- State may, under police power, modify rates fixed by contract between public service corporation and customers, 101 C 151
- where customer is a municipality, 101 C 151
- unless State has clearly delegated rate-making power to municipality, 101 C 151
- or unless rates are fixed by ordinance chartering the company, 101 C 151
- this power is a necessary incident of rate-making power, 101 C 151
- and existed in public utilities commission before passage of act of 1921, 101 C 151
- commission now exercises exclusively or concurrently many powers which were formerly exclusively in towns, 103 C 197
- city ordinance regulating number of operators on streetcars *held* to invade exclusive function of commission, 103 C 197
- municipalities can rarely now exercise power over street as regards street railway company, 103 C 198
- commission cannot make negative order de protection at grade crossings, 103 C 508
- power to modify rates established by contract between municipality and water company, 106 C 563
- power of commission to regulate operation of motorbuses, 113 C 416

Public Utilities Commission § 3

commission has right under statute to reopen and rehear case after due notice to all parties in interest, 113 C 494

Docket 6253 established minimum requirements as to insurance by carriers over highways of State, except where adequate financial responsibility shown, one of provisions being that insurance should be in company licensed to do business in State, 122 C 288

—statute conferring power on commission to decide financial responsibility of applicant and to require that it be adequate did not confer authority to make general regulations concerning insurance so as to give this docket force and effect of law, 122 C 289

—but commission under its expressly conferred powers to require adequate financial responsibility could impose any reasonable requirements regarding insurance which it would accept in lieu of showing of financial responsibility, 122 C 289

—paramount consideration for this requirement was that insurer have financial stability and this consideration not fully satisfied by appointment of agent for service of process in this State by insurance company not authorized to do business here, 122 C 289

—requirement that carrier should insure in company licensed to do business in this State before it should transport property over highways of State *held* not unreasonable and within powers of commission to require adequate financial responsibility, 122 C 289

—for constitutionality of requirement, see CONSTITUTIONAL LAW

fact that commission has jurisdiction to hear and determine disputes over charges for service does not deprive equity of jurisdiction to enjoin shutting off of service to coerce payment of disputed bill, 123 C 180

§ 3. Appeal; Function of Court

on appeal, the legality, expediency and propriety of commission's orders are reviewed, 88 C 472

court must re-examine propriety of commission's orders, if equity of its apportionment is questioned, 88 C 472

commission, and court on appeal, do not sit as judicial tribunals, and technical rules do not apply, 88 C 472

on appeal from exercise of judicial function, only question is, did tribunal act illegally or exceed or abuse its power, 88 C 472

apportionment of cost of new highway bridge between municipality and street railway presents judicial question, for Superior Court, 89 C 537

commission's determination of purely administrative matters, unless made without evidence, is final, 89 C 537

whether gas company furnished adequate service is question of fact; all parties should be heard by court, 91 C 134

on appeal, court should hear testimony on issue of fact raised, 91 C 134

—no finding of facts necessary by commission, 91 C 144

fixing of rates of public utilities is a legislative function not imposed on the courts, 91 C 692

—they may decide whether commission's order fixing rates is reasonable, 91 C 692

—“reasonableness” must be determined in each case, 91 C 692

—distance passenger is carried on one line not controlling in determining reasonableness of fare on another line, 91 C 692

determination on appeal to Superior Court of reasonableness of rate order made by public utilities commission is a judicial question, 91 C 698

on appeal, court cannot regard expediency or wisdom of commission's acts, 95 C 26

—cannot substitute own judgment for that of commission, 95 C 26

power of court to review orders of, 95 C 26, 97 C 453

—relocation of street railway tracks, 95 C 26

—granting certificate for certain route to jitney driver and determining extent of service, 97 C 453, 728

—where rates fixed or expenditures required are deemed confiscatory, 97 C 453

—determining that public convenience and necessity do not require jitney service over certain route, 97 C 454

appeal from public utilities commission is confined to judicial or quasi-judicial questions, 97 C 453

duty of commission and of court on appeal, 99 C 282

—hearing before court is *de novo*, 99 C 282

—court may consider telephone system used in relation to charges and different rates for different zones in city, 99 C 282

—form of judgment where court does not find rates unreasonable, 99 C 282

—that certain system not in general use is relevant evidence on issue of adequate service, 99 C 287

—decision based upon comparison of rates by use of schedules not in evidence is erroneous and appeal should be sustained on that ground, 99 C 293

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§ 3 Public Utilities Commission

- cial review, for illegal or arbitrary action or abuse of discretion, 111 C 634
- court cannot substitute its judgment for that of commission or reverse it because it holds result inexpedient, 113 C 494
- can reverse it only if decision of commission goes so far as to be an abuse of its powers, 113 C 494
- principles apply to proceeding for removal of grade crossing, 113 C 494
- where expense of eliminating grade crossing was allocated partly to railroad company, appeal in which latter is not joined is demurrable, 113 C 494
- statutory provision that appeal shall be served on parties having adverse interest; meaning of “adverse,” 113 C 503
- function of court upon appeal is to review conclusions of commission, 114 C 628
- it cannot in the first instance pass upon the reasonableness of rates or requirements for extending service, 114 C 628
- where plaintiff failed to raise question before commission as to reasonableness of

- requirements for extension, court properly refused to consider it, 114 C 628
- appeal from conclusion of court that water rates fixed for city of New Haven and its inhabitants by public utilities commission were illegal and void, 118 C 389
- in appeal from order of commission revoking license to operate taxicabs, Superior Court not empowered to try case de novo but properly heard it upon certified record, 126 C 543
- revoking certificate just as much an administrative matter as action in originally granting it, 126 C 549
- Superior Court does not retry disputed questions of fact decided by commission but determines whether it acted illegally, arbitrarily, in abuse of power, or without notice and reasonable opportunity to be heard, 126 C 543
- proper parties to appeal from commission’s decisions, 127 C 21
- on appeal from commission, court disposes of issues upon equitable principles, 127 C 271

PUBLIC UTILITY COMPANIES

See also ELECTRIC LIGHT AND POWER COMPANIES; GAS COMPANIES;
PUBLIC UTILITIES COMMISSION; RAILROADS; STREET RAILWAYS;
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- apportionment of cost of new highway bridge between municipality and street railway presents judicial question, for Superior Court, 89 C 537
- how far its decisions can be reviewed, 89 C 537
- what is equitable expense to be charged against company is what is just under circumstances, 89 C 537
- should include cost of strengthening entire bridge for a double track, even cost of a new bridge, 89 C 537
- cannot consider amount contributed by State to reduce expense, the cost of paving, etc., 89 C 537
- in estimating cost of bridge, it is not proper to estimate an amount in excess of railroad’s and public’s requirements in size, design, form and ornamentation, 89 C 537
- reasonableness of rate determined by viewing effect on public and company, 91 C 692
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- what are “fair,” “reasonable,” or “just” rates, 106 C 563
- public utility cannot make any contract by which its power to perform its public function would be impaired, 118 C 71
- it cannot by contract with individuals or another corporation avoid performance of a duty owed to the public, 118 C 71
- general principles relevant to rates charged by utility serving several different communities, 118 C 389
- where large city and smaller surrounding towns, higher rate may be prescribed for latter, 118 C 389
- such differentiation involves apportionment of values, revenues and expenses, 118 C 389
- where water is all secured from same source, with no unreasonable extensions to serve lean territory or other elements creating material difference in cost, uniform rate for entire territory justified, 118 C 389
- basic consideration in deciding reasonable and proper rates is fair value of property, as just compensation consists in fair return on such reasonable value, 118 C 401
- facts include actual cost, time and circumstances of outlay and effect of altered conditions, 118 C 401
- purpose is to enable intelligent forecast of probable future values, as bearing on validity of rates in future, 118 C 402
- rates must not be so low as to be confiscatory nor so high as to exceed value of services, 118 C 402

Questions of Law and Fact

- question is primarily one of fact, depending on circumstances in particular case, 118 C 402
- effects of depression on purchasing power of consumers have never been accorded controlling effect on rates or expressly recognized as independent factor in fixing them, 118 C 404
- utility entitled to return sufficient not only to provide for current repairs but also to permit setting aside annually and accumulating a depreciation reserve, 118 C 410
- public utility supplying service such as water, gas or electricity may adopt rule that service supplied customer may be shut off from one who has defaulted in payment, 123 C 180
- exception where there is bona fide dispute as to customer's liability or correctness of bill, 123 C 180
- and where this is case, present or threatened shutting off ground for injunction or restoration on proper conditions, 123 C 180
- and if charges were unjust or erroneous company liable for damages naturally flowing from act, 123 C 180
- fact that public utilities commission has jurisdiction to determine disputes over charges, nil sig., 123 C 180
- and where real dispute related to interpretation by defendant of rate schedule as applied to plaintiff for certain months, Superior Court could issue injunction and ultimately award damages, 123 C 180
- within province of court to decide propriety of charge which was subject of controversy, 123 C 180
- holder of certificate for operation of taxicab operates upon implied condition that he will not offend against public health, safety or morals, 127 C 267
- if permittee operates through agents, it is his duty to exercise reasonable supervision, 127 C 267
- if he does not and if taxi has been so operated, this constitutes cause to revoke certificate, 127 C 267
- so where son operated cab for immoral purposes, revocation of license of father sustained though it was not shown that he had any actual knowledge of the use at the time, 127 C 267
- written notice of injury to public utility, provided by 1935 statute (since repealed) being for benefit of defendant is protection upon which it may insist but one which it may waive, 128 C 132
- jury could find defendant never had intention of claiming lack of notice until case came into hands of attorney, 128 C 133

QUANTUM MERUIT

See CONTRACTS § 39

QUASI AND IMPLIED CONTRACTS

See CONTRACTS § 39

QUESTIONS OF LAW AND FACT

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one who walks into street with oncoming trolley in plain view is guilty of contributory negligence as matter of law, 98 C 482

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contributory negligence not for jury if no room for reasonable doubt, 103 C 526

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where measure of duty and extent of performance present one question, trial court's determination is conclusive, 105 C 625

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where negligence alleged is the violation of statute, that negligence is matter of law; passing to left of street intersection as example, 116 C 78

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standard of duty is question of law; measure of duty is question of fact, 108 C 180, 113 C 556

proximate cause is ordinarily question of fact, 110 C 184

if natural tendency of act is to create danger and inflict injury it may be found nuisance as matter of fact, 113 C 389, 120 C 502

if mind of a fair and reasonable man could reach only one conclusion, question becomes one of law and verdict may be directed; but if room for fair disagreement, then issue should go to jury, 116 C 443

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See CLOUD ON TITLE

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See also PUBLIC OFFICERS

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RAILROAD COMMISSIONERS

NOTE: The Public Utilities Act, enacted in 1911, vested the powers of the railroad commissioners, and new and enlarged powers, in the public utilities commission.

See also PUBLIC UTILITIES COMMISSION; RAILROADS § 4

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- owner abutting on highway whose rights have been threatened by unauthorized, irregular or unreasonable action of commissioners can appeal; his interest can be implied from facts alleged, 84 C 25
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- purpose of statute allowing commission to abolish or order spur track across highway is to further settled policy to abolish grade crossings, 84 C 581
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- unnecessary for street railway company to try to get land by agreement or condemnation before asking approval of layout, 86 C 37
- fact that railway had entered land without authority and that suits were pending does not prevent it from asking to have land condemned, 86 C 37
- failure to state in petition that directors had voted to take land does not make act of commissioners beyond their jurisdiction when it appears from their decision that such vote was passed, 86 C 37
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RAILROADS

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3. LOCATION AND CONSTRUCTION; TAKING OF LAND; RIGHT OF WAY
4. GRADE CROSSING AT HIGHWAYS
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6. LIABILITY FOR INJURIES TO PERSON AND PROPERTY
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8. ———Accidents at Grade Crossings and on Tracks
9. ———Contributory Negligence; Last Clear Chance
10. BONDS AND MORTGAGES; LEASES; LIENS; RECEIVERSHIPS; REORGANIZATION

NOTE: Cases concerning liability of railroad to employees are listed under CARRIERS § 13, where they involve Federal Employers' Liability Act and interstate commerce, and under MASTER AND SERVANT § 3, where they involve ordinary principles of master and servant. Cases involving injury to passengers on railroads are listed under CARRIERS § 7, and those involving goods transported under CARRIERS § 2.

See also BAILMENTS; BILLS OF LADING; DEATH BY WRONGFUL ACT;
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liable for interest on value of goods destroyed through fire, 60 C 124

railroad company cannot secure benefit of insurance by plaintiff on property burned, 60 C 124

—there is no privity in such case between railroad and insurance company, 60 C 131 where finding shows fire was caused by locomotive of railroad company, negligence is presumed, 60 C 135

—even though finding makes no reference to negligence, 60 C 135

where railroad station was set on fire by sparks from engine, and the fire was communicated to plaintiff's property, company *held* liable under statute, 62 C 331

where fire starts from engine and extends to other property, without intervening cause, fire from engine is proximate, 62 C 331

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juries to plaintiff from steel tape contacting feed wire below bridge which furnished power for railroad, 126 C 468

—basic question was whether defendants guilty of breach of duty in failing to provide safeguards; failure to comply with certain regulations of utilities commission, nil sig., 126 C 473

—no liability in nuisance; under circumstances unguarded feed wire did not have natural tendency to create danger or inflict injury, 126 C 468

—bringing tape in contact with feed wire and with themselves was hazard upon basis of which negligence of plaintiffs to be determined; no contributory negligence, 126 C 468

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§ 8. —Accidents at Grade Crossings and on Tracks

in action for injury to cow, no averment that it was on defendant's tracks is required, 23 C 101

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—not liable where horse strayed from track of another road to track of defendant, where the only negligence alleged was a failure to fence between roads, 57 C 442

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no duty is owed to persons wrongfully on tracks and not seen until it is too late to avoid accident, 87 C 623

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—in ordinary case may be satisfied by compliance with statutes and orders of public utilities commission, 102 C 735

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—jury might conclude that brakeman should have seen decedent running toward track and warned engineer, 127 C 322

—defendants charged with knowledge of those conditions which operators of the train should in exercise of reasonable care have observed, such as use of pathways across tracks, 127 C 325

—not entitled to assume that little girl approaching track would stop before reaching zone of danger as in case of adult, 127 C 326

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§ 9. —Contributory Negligence; Last Clear Chance

railroad *held* not liable to person attempting to cross railroad when he knew, or could have seen that train was about to pass, 50 C 379

—where injury was caused by jumping from a carriage caught between gates, 50 C 379 at railroad crossing both traveler and railroad must take precautions, 50 C 394

—immaterial that crossing is a highway open to the public, 50 C 393

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duties of a traveler approaching grade crossings; on facts railroad *held* negligent, 82 C 142, 84 C 444, 90 C 52

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where plaintiff stopped, how he looked, and how far, is for the jury; also whether he acted reasonably, 91 C 327

contributory negligence of motor truck driver who drives on track when train is approaching, 95 C 479

driving over a grade crossing in face of a visible, fast train; refusal to set aside a verdict for plaintiff *held* error, 98 C 743

plaintiff drove long lumber wagon onto grade crossing and then continued on, though train visible; *held* doctrine of last clear chance applied, 104 C 229

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—if he drives ahead when red signal is flashing, in reliance on statement of companion that it was all right, he could not reasonably be held free of negligence, 107 C 417

duty of one about to cross track to look for approaching train, in time to stop if he sees one, 110 C 145

—last clear chance doctrine not applicable when engineer could neither have realized that plaintiff would drive on track nor thereafter have had opportunity to stop, 110 C 145

plaintiff injured at grade crossing; contributory negligence, 111 C 725

passenger on front seat of automobile *held* guilty of negligence as matter of law in failing to look for train at crossing, 112 C 279

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position of peril under doctrine of supervening negligence where one crossing tracks is within space occupied by tracks and adjoining space so near that there is a liability to injury from train, 116 C 127

—burden of proof is on plaintiff to establish all necessary facts, 116 C 127

—where proof failed to show how far away train was when plaintiff came into zone of peril, trial court properly refused to charge jury on doctrine, 116 C 127

driver of fire truck killed by train while crossing tracks on way to fire; request de standard of care of one going on premises of another to save life or property not applicable, 116 C 127

one approaching railroad crossing not relieved from exercising senses and avoiding collision with train because of ignorance of crossing if presence of railroad is obvious to one using ordinary powers of observation, 116 C 638

—nor by fact that attention was occupied in guiding automobile on highway, 116 C 642

mere fact (brought out by interrogatories) that man was on railroad crossing swinging white lantern would not make operator of automobile struck by train guilty of contributory negligence as matter of law, 119 C 630

—but where evidence showed he saw no light and heard no signal of approach of train, though employee was swinging lighted lantern across line of street, he was negligent in law, 119 C 630

—doctrine of supervening negligence not applicable as decedent's negligence continued as active force down to moment of collision, 119 C 630

plaintiffs injured from steel tape contacting feed wire below railroad bridge not legally open to traffic; no contributory negligence and plaintiffs did not assume risk of so unusual an occurrence, 126 C 469

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—where when decedent came within that space it was too late for trainmen to avoid accident, doctrine not applicable, 127 C 322

§ 10. Bonds and Mortgages; Leases; Liens; Receiverships; Reorganization

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perpetual lease of a Massachusetts railroad is not an "owning" within statute, 48 C 44

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—but may have an equity superior to that of a prior incumbrancer, 49 C 167

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mortgage of franchise, layout, appurtenances, etc., necessary to the construction and operation, *held* not to convey land purchased by railroad company outside of layout, and not necessary for the construction and use of railroad, 50 C 150

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- that land stood in the private names of the president and treasurer of railroad, *held* immaterial; they hold in trust for railroad, 50 C 150
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- invalid vote of town to guaranty bonds; guaranty *held* of no effect, 51 C 22
- later vote based on mistake of fact, *held* no ratification, 51 C 22
- incorporated bondholders of railroad company form a new and distinct corporation, 51 C 402
- bondholders take the railroad subject to public trust, 53 C 333
- provision that in default of interest for six months the bonds could be considered due by any holder and foreclosed; *held* each bondholder took subject to this right of his cobondholders, 53 C 333
- could not, by electing not to have his bond become due, obstruct action of majority, 53 C 333
- any holder of railroad bond is a party to proceeding for foreclosure and reorganization brought by treasurer of State and majority of holders, 53 C 333
- is represented by trustee and other bondholders, though without notice, 53 C 333
- where mortgage is made to treasurer of State as trustee he may exercise a wide discretion within his powers, 53 C 333
- where mortgage of railroad is foreclosed, Legislature has power to authorize bondholders to reorganize with rights of old company, if bondholders so vote by a majority, 53 C 333
- a dissenting minority have no private rights which can stand against such action, it being in furtherance of a paramount public trust, 53 C 333
- reorganization; three-fourths preferred stock, one-fourth common stock; bonds becoming preferred stock; *held* new company could lease for ninety-nine years on a three-fourths vote, 53 C 351
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- special act *held* to empower company to pay dividends on such issue, though capital stock was then impaired, 54 C 156
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pointing out bounds of land not admissible to make certain a defective description of written agreement, 88 C 548

terms of sale may be agreed upon even if bill of sale referred to is not executed, 88 C 555

one who agrees to buy real estate need not accept anything short of full and complete title, 89 C 215

building voluntarily erected on land of another becomes part of real estate, 91 C 13

right to use a spring by A “his heirs and assigns” *held* to convey fee determinable upon nonpayment of rent, 91 C 146

owner of land, who has conveyed a base or qualified fee, has only a possibility of reverter, 91 C 146

no claim can be made that one should have examined land records for title where title is intentionally misrepresented, 94 C 219

constructive knowledge from land records does not apply where purely personal rights are concerned, 94 C 219

same property may be real as between mortgagor and mortgagee and personal as between mortgagor and vendor, 124 C 65 and see **FIXTURES**

ownership of property involves right to exercise to some extent dominion over it; in particular State, involves right to exercise such dominion in that State, 127 C 107

RECEIPT

See **PAYMENT** § 6

§ 1 Receivers

RECEIVERS

- § 1. IN GENERAL
- 2. APPOINTMENT AND REMOVAL; GROUNDS FOR RECEIVERSHIP
- 3. TITLE TO AND POSSESSION OF PROPERTY
- 4. POWERS AND DUTIES
- 5. SUITS BY AND AGAINST
- 6. RIGHTS OF CREDITORS
- 7. —In General
- 8. —Claims

NOTE: Cases pertaining to banks in receivership are listed under BANKS AND BANKING § 8.

See also BANKRUPTCY; CORPORATIONS § 17

§ 1. In General

should give bonds, 2 C 396

no legal connection between appointment of receiver and dissolution of company; receivers may exist without any dissolution of corporation, 56 C 476

is an officer of the court and derives his authority from the practice of courts of equity, 58 C 254

money in hands of receivers of insolvent life insurance company awaiting order for distribution *held* not taxable under statute, 61 C 112

property in hands of receivers is in hands of court, and does not "belong" to receiver within statute de taxation, 61 C 112

receiver as representing corporation and creditors, 66 C 16, 74 C 359, 367, 76 C 377, 82 C 422

statute as to notice of pendency of action affecting real estate not applicable to action for receiver of partnership, 66 C 350

property in the hands of a receiver is taxable by State, 72 C 58, 82 C 406

effect of decrees in receivership action in foreign State, 73 C 378, 78 C 605, 79 C 175

restrictions on liability of shareholders to corporation are removed by appointment of receiver, 75 C 441

where one of two temporary receivers is continued as permanent receiver, other not estopped by application for such continuance to claim release from joint bond on first appointment, 79 C 470

company terminated by receivership can be revived by court so as to sue on an obligation, 82 C 334

corporation not dissolved by appointment of receiver; stockholders can meet and shares be transferred, 82 C 418

receivership is suspended by subsequent bankruptcy, 84 C 712

principles applicable to receivership are applied in settling estates of insolvent debtors, 85 C 695

appointment of receiver does not terminate a trust unless it is so provided by trust agreement, 89 C 646

fund deposited with state treasurer by insurance company in accordance with the statute must share in expense of insolvency, 93 C 140

national bank may act as a receiver, 94 C 648
directors winding up corporation in voluntary dissolution are not receivers, 96 C 73, 79

members of partnership stand in relation of vendors to persons buying at receiver's sale; effect of purchase by one, 97 C 162

uniformity of decision in federal and state courts desirable, especially in receivership cases, 98 C 414

nature of proceedings; necessity of speedy settlement, 98 C 421

misapplication of checks by agent of, through negligence of bank; bank *held* liable, 99 C 494

attempted foreclosure of invalid mechanic's lien no bar to reclamation petition in receivership proceedings, 101 C 1

effect of receivership as discharge of bond in terms of that prescribed to release attachment but given to release only part of property attached and in amount equal to agreed value of that part, 101 C 541

where Connecticut receivers made loans to be repaid from profits of cropping operations on lands in other States where ancillary receivers were appointed, Superior Court *held* to have jurisdiction over disposition of proceeds, 104 C 206

by appointing receiver, state court acquires jurisdiction over property therein, not controllable by any other State, 104 C 206

court of ancillary receivership may order distribution of assets within its State; but ordinarily they will be turned over to State of primary receivership, 104 C 206

care should be taken by counsel, courts and their officers to strictly comply with statutes, rules and court orders, 111 C 605

confirmation of sale as curing all defects not of jurisdiction or fraud, 111 C 605

—orders of sale are ambulatory and may be modified, 111 C 606

—rule caveat emptor applies, relaxed only on theory bids are on assumption of no undisclosed defects, 111 C 606

—purchaser as party to proceeding, 111 C 610

—may object to confirmation, 111 C 611

allowances to appraisers and assistants; where receiver testified as to the matter but was not sworn and appellants did not object they waived any defect, 116 C 730

validity of appointment of experts to assist appraisers not open to question when no appeal was taken from order authorizing their employment, 116 C 731

claim by receiver of corporation for unpaid stock subscription is equitable not legal and jury trial is not matter of right but rests in discretion of court, 117 C 445

—fund is one applicable to payment of corporate creditors; is trust fund for their benefit, 117 C 445

proceeding for appointment of receiver to take possession of assets and for dissolution of corporation, is an action in equity, 117 C 450

whether corporation in receivership shall be dissolved rests in sound discretion of court, 120 C 235

court may properly assume that value of property stated in inventory is its true value, 121 C 77

in receivership proceedings there should be uniformity of decisions in the federal and state courts, 123 C 80

appointment of receiver of rents after appeal taken to Supreme Court in action is not final judgment permitting appeal, 126 C 715

—proper procedure is to file additional assignments of error and if necessary secure additional finding, 126 C 715

§ 2. Appointment and Removal; Grounds for Receivership

bill for appointment of receiver must show necessity, 2 C 396

receiver of rents and profits not usually appointed in case of mortgage of undivided share, 16 C 517

not to be appointed for firm until notice to adverse partner, 41 C 305

application for receiver by insurance commissioner; answer that another company has assumed its liabilities is insufficient, when, 45 C 378

agreement de patents; court may appoint receiver, when, 60 C 374

petition for appointment of receiver of insurance company may be brought by insurance commissioner to Superior Court if in ses-

sion and if not, to a judge of state Supreme Court, 63 C 579

failure of receiver to sue stockholders and other grounds for his removal, 66 C 277

appointment of manager of insolvent corporation as receiver discountenanced, 70 C 473

removal; notice and its waiver; proceedings open up his entire conduct; conduct before appointment; irrelevant finding as to personal liability; no appeal, 70 C 473

in determining assets of an assessment insurance company no value shall be assigned to the power to levy assessments, 71 C 751

—under statute de appointment of receiver of insurance company, financial condition as of date of hearing controlling, 71 C 751

—nature of powers exercised by judge in the proceeding, 71 C 754

rules for appointment of receiver for corporation same as in case of unincorporated association; creditor may be appointed; appointment to enforce judgment secured against corporation which has transferred all assets to foreign corporation, where two are acting collusively, 73 C 587

appointed merely as ancillary to equitable relief; creditor may be; final decree should give complete relief, 73 C 587

power of equity to wind up insolvent corporation, 73 C 590

appointment is equivalent to attachment by all creditors, 74 C 370

judgment appointing receiver never terminates cause; no appeal lies, 74 C 652

waiver of objection to appointment by acquiescence, 76 C 252

some equity must appear as basis of appointment; cause need not be determined on its merits before temporary receiver is appointed; appointing such receiver in chambers, 76 C 252

power and discretion of Superior Court to appoint receiver; that business always run at a loss not necessarily ground for dissolution, 80 C 558

exclusive right of insurance commissioner to apply for receiver where company is acting illegally, 80 C 684

appointment to take charge of property where trustee in bankruptcy has secured judgment setting conveyance aside as fraudulent and an appeal has been taken, 81 C 116

receiver proper where corporation dissolved by quo warranto, 81 C 472

no receiver will be appointed for an accounting in a transaction that was intended to defraud the public, 83 C 430

appointment to receive rent pending action to quiet title, 85 C 434

statute furnishes complete remedy for dissolution of corporation and appointment of receiver to wind up its affairs, 87 C 656

§ 2 Receivers

- minority stockholders must first seek redress through officers; exception to the rule, 87 C 656
- statute, not equity, winds up company where officers are usurpers and wasting assets, 87 C 661
- receivership averts danger of public service company being tied up by attachment, 89 C 60
- can be appointed for property of foreign corporation in Connecticut even before home State acts, 91 C 91
- cannot dissolve a foreign corporation but can appoint a receiver for its local business, 91 C 91
- wisdom of appointing a receiver of a foreign corporation does not affect jurisdiction to do so, 91 C 92
- defects in complaint are of no consequence on question of jurisdictional right to appoint receiver, 91 C 92
- in action for corporate receiver such relief may be denied where collection of unpaid subscriptions for stock more effective; judgment rendered ordering corporation to take all necessary steps to compel payment, 104 C 684
- appointment in sound discretion of court, not to be disturbed in absence of abuse, 111 C 497
- if some less drastic action would answer, it should be taken, 111 C 497
- solvency of defendant corporation not necessarily a weighty consideration, 111 C 500
- if full hearing had on appointment of temporary receiver after return day, defendant not entitled to retrial on permanent appointment, 111 C 497
- failure to give notice of appointment of permanent receiver waived by those entitled to notice if no objections made where court had jurisdiction, 111 C 605
- purchasers at sale who failed to appeal from order confirming it cannot make objection when sued for specific performance, 111 C 605
- courts of equity may intervene by injunction or receivership to protect property rights where no remedy at law; discretion of court, 113 C 636
- where defendant moved to revoke order appointing receiver of rents and was heard, objection for lack of notice of original hearing not open, 114 C 349
- where neither complaint nor application for appointment of receiver contained proper allegations but necessary issues were raised on motion to revoke, denial of motion imports finding of necessary facts, 114 C 349
- appointment of receiver of rents in foreclosure action not final judgment from which appeal lies, 114 C 351 (note)
- refusal to revoke appointment equivalent of new appointment, 114 C 352
- insolvency or bankruptcy is not, per se, a legal disqualification for duties of trustee, 117 C 584
- when reason or necessity for receiver ceases to exist receiver should be discharged, 120 C 235
- stockholders who had previously signed proxies to be voted for voluntary dissolution of corporation not knowing facts, neither waived right nor were estopped to ask appointment of receiver, 127 C 25
- distinction between voluntary dissolution under control of directors and trustees and a statutory receivership, 127 C 26
- fact that corporation is in voluntary dissolution does not prevent application of receivership statute, 127 C 26
- proof of directors' misconduct prior to voluntary dissolution may be considered, 127 C 26
- where director-trustees were directors and officers of three closely related corporations, one of which was summarily taking over assets of defendant, appointment of receiver justified, 127 C 26
- complaint *held* sufficiently inclusive to make inquiry into general conduct of officers of corporation relevant and to support a judgment of receivership, 127 C 32
- where court appoints receiver, it has discretion to direct execution to issue forthwith, 127 C 34
- where corporate existence is attacked by receivership suit, corporation has right to defend and charge receiver with expense of defense provided it was made in good faith, 127 C 35
- such allowance in sound discretion of court, 127 C 35
- where some remedy less stringent will meet needs of case, receiver and dissolution should not be resorted to, 128 C 534
- dissensions among members of corporation without capital stock *held* not sufficient grounds for dissolving it in view of facts, 128 C 535
- dissenting opinion holds that contrary finding by trial court was not rendered in abuse of discretion resting in it, 128 C 543
- where Legislature indicated grounds for dissolution of corporation and added "any good and sufficient reason," the general words referred to other causes of same general nature, 128 C 539
- impossibility of carrying on corporate purposes and objects constitutes "good and sufficient reason" within language, 128 C 539

§ 3. Title to and Possession of Property

- statute does not undertake to change title of property or vest it in receiver, 44 C 562
- receiver of insurance company cannot compel state treasurer holding funds under statute to surrender same, 56 C 234
- agreement that receivers will use said funds for policyholders is of no legal significance, 56 C 239
- but receivers are entitled to dividends and income of such trust funds, 56 C 240
- unpaid stock subscription notes form part of assets of insurance company, 65 C 471
- right of receiver to recover unpaid stock subscriptions, 66 C 16
- property vests on appointment, 66 C 350
- right of receiver to recover dividends paid, when corporation is insolvent; evidence of insolvency, 72 C 118
- receiver can issue calls on stock or sell right to collect unpaid subscription, 73 C 379
- receiver of insolvent corporation is its statutory successor, 73 C 381
- allegations of complaint by receiver to recover unpaid balance of subscription; release by corporation no defense unless in bona fide compromise, 73 C 477
- receiver is entitled to have estate freed from liens fraudulent as to creditors; mortgage withheld from record, 74 C 367
- receiver to collect rents pending action to quiet title, 85 C 434
- receiver's rights to debtor's property dates from time of his appointment, not commencement of suit, 87 C 369
- receiver of a conditional vendee is not his personal representative; conditional sale held to be absolute, 87 C 369
- receiver is mere trustee for creditors; takes property subject to all claims and defenses available before insolvency, 88 C 195
- receiver takes assets burdened with all valid liens and equities, 89 C 645, 91 C 354
- trustee of collateral to secure bonds of insolvent corporation can hold and administer same as against receiver, 89 C 645
- pledgee held not negligent in permitting receiver to take pledged goods, 90 C 416
- receiver cannot recover on stock subscriptions where rights are already adjudicated in bankruptcy; takes property in condition it then is, 91 C 354
- conditional bill of sale made by insolvent is valid against receiver though not acknowledged or recorded, 101 C 3
- right of mortgagor's receiver to claim marshaling of assets in suit to foreclose mortgages of realty and personalty, 103 C 732
- several forms of judgment which may be decreed in such action, 103 C 732
- receiver so far represents creditors that he is proper party to attack mortgage of real and personal property on ground that description of latter is too general, 103 C 742
- receiver is arm of the court and it has real possession of property, 103 C 743
- court will look through failure on his part to protect creditors and take necessary action of its own accord, 103 C 743
- appointment transfers property to him to be administered primarily for creditors, 103 C 743
- receiver of conditional vendee not his "personal representative"; receiver's rights superior to vendor's, 104 C 568
- receiver not a personal representative of vendee under conditional sales law, 105 C 584
- as representative of creditors, 105 C 587
- receiver's right to possession of property dates from appointment, 106 C 159
- after appointment of receiver, property cannot be attached, incumbered or repossessed by conditional vendor or chattel mortgagee to receiver's disadvantage, 106 C 159
- right to enforce obligation of subscribers to corporation being organized to discharge debts incurred, though corporation never organized, 107 C 216
- receivers of corporation represent its creditors and are not "personal representatives" within exception in conditional sales statute, 114 C 69
- receiver in foreclosure holds property as arm of court and his possession not that of mortgagee; application of income and profits to discharge obligation of mortgagor and mortgagee, 115 C 652
- G Company executed conditional sales contract of car to employee, and assigned it to C Company who paid \$900, all parties knowing that it was not in fact a sale but purpose was to enable G Company to raise money by the assignment; held
- that transaction was in effect a chattel mortgage with retention of possession by mortgagor, 116 C 487
- that it was invalid against creditors of G Company and hence against receiver who succeeded to their rights, 116 C 487
- C Company paid distributor S Company for cars delivered to dealer G Company and took receipt; G Company executed and recorded "trust receipt" for them as agent of C Company agreeing to hold them in trust for latter and if it sold them for cash to turn proceeds over to latter; held
- that title passed to C Company and never was in G Company, 116 C 487
- that there was no retention of possession of previously owned property by G Company with resulting deception of creditors as in case of chattel mortgage, 116 C 487
- that if transaction was conditional sale, contract was acknowledged and recorded in compliance with statute, 116 C 487

§ 3 Receivers

- that if it was consignment, transaction was bailment and cars not subject to attachment by creditor of bailee, 116 C 487
- that in either case title of C Company was superior to that of receiver of G Company, 116 C 487
- conditional sale to corporation not complying with statute is absolute sale against its receiver because he also represents interests of creditors, 117 C 163
- receiver succeeds to assets of estate subject to all outstanding equities against it, 118 C 47

§ 4. Powers and Duties

- receivers may enforce contracts which the company could not, when, 29 C 385
- receiver appointed in another State may bring property here without its being attachable, 45 C 126
- such receiver stands here in position of assignee in insolvency, 45 C 126
- receiver completing job; materials used belong to receiver, though he is receiver of foreign corporation and materials are purchased here, 46 C 473
- compensation and profits of work belong to receiver, 46 C 473
- such compensation cannot be taken by foreign attachment as belonging to company, 46 C 473
- though contract forbid subletting or assignment, 46 C 473
- in completing job receiver is not agent of the corporation, 46 C 473
- receiver may allow mortgagor of satisfied mortgage to use company's name in ejectment, 47 C 190
- powers of receiver, in general, 52 C 108, 361
- receivers appointed under statute have no power to disregard existing lawful contracts, 56 C 239
- receiver cannot attack as against the real owner, a sale of property not belonging to his debtor, on ground of retention of possession, 57 C 395
- receiver has no right as such to employ counsel without consent of court, 58 C 251
- court will fix amount to be paid counsel for services, 58 C 251
- where employed without direction of court, and he appears at final accounting, held bound by allowance fixed by court, 58 C 251
- may make himself personally liable on his contracts, 58 C 251
- will only be protected by court when acting strictly under its rules, 58 C 251
- receiver of insolvent life insurance company; in what sense he is trustee, 61 C 125
- court may, but rarely should, direct him as to what wages to pay; nature of and appeal from judgment on petition of employees

- asking restoration of wage schedule, 69 C 709
- not "personal representative" within statute as to conditional sales; may be included in that term; unrecorded conditional sale and chattel mortgage only recorded long after his appointment not good against him, 70 C 220, 321
- discretion of court as to denying application to sell property, 70 C 473
- duty to fulfil contract of insolvent corporation with partnership to which it succeeds, 72 C 62
- receivers of New York corporation dissolved by decree of court there may specially appear to procure dismissal of suit here against corporation and vacating of attachment, 73 C 151
- court should not direct receiver to employ counsel to represent insolvent in action wherein receiver may be plaintiff, 74 C 652
- receiver cannot affirm wrongful investment of directors and accept worthless securities, 75 C 561
- money paid at receiver's request treated as payment by him, 76 C 25
- right to abandon contract of insolvent, 76 C 28
- equitable principles govern settlement of estate, 76 C 377
- life insurance company cannot carry on business after receivership, 81 C 592
- provision in certificate of incorporation of company organized to succeed partnership, allowing creditors of partnership to trade in stock for groceries enforceable against corporation and its receiver, 82 C 417
- if dissolution of corporation makes it impossible to enforce right equity will enforce it against receiver, 82 C 423
- rights and procedure where bankruptcy succeeds receivership within four months, 84 C 712
- receiver can compromise a demand made upon his insolvent for assessment on shares of stock held by him, 86 C 463
- receiver of building corporation may file lien on property for material and labor furnished, 90 C 8
- ancillary receiver of foreign corporation; rights and powers in general, 91 C 98
- receiver may employ and pay broker to sell plant, 91 C 191
- receiver appointed months after an obligation of a bankrupt company becomes fixed must recognize the same, 91 C 197
- rights of receiver of banking company, in connection with an issue of bonds secured by collateral, that was to be surrendered as bonds were paid, when some of the bonds were paid before receivership but not returned until after, 94 C 94

no burden on receiver to show actual fraud in order to attach or avoid a transaction, 94 C 384

contract by corporation to buy back its stock for price paid if not successful, *ultra vires*, 101 C 534

—creates a preference and violates statute, 101 C 534

—cannot be enforced against receiver where corporation derived no benefit and was not estopped, 101 C 534

duty to protect creditors; if he fails to do so, Supreme Court may on appeal correct judgment of its own motion, 103 C 732

protection of receiver's rights in interest of public policy, 104 C 559

officer of court for all who have interest in property, 109 C 329

subject to all the notice and obligations of inquiry attaching to insolvent as to unrecorded instrument, 113 C 476

Superior Court has jurisdiction to authorize receiver to borrow money and carry on business; statutes do not limit this power in bank receiverships, 115 C 530

corporation or its receiver cannot appropriate benefits of contract made by officer and repudiate obligations entered into by him therein, 117 C 58

—when agent has made contract in excess of authority, principal must affirm or repudiate it in its entirety, 117 C 58

receiver of trustee of mortgage for bondholders who had paid interest where mortgagor was in default entitled to present coupons and share in distribution under reorganization of corporation, 123 C 591

—receiver in such situation represents interests of creditors of trustee, 123 C 600

company issued participating certificates against a mortgage, assigning to each holder an undivided share in note and mortgage and guaranteeing payments; company became insolvent and receiver was appointed, 128 C 360

—certificate holders were purchasers of share in mortgage subject to conditions of agreement, 128 C 361

—when company came into possession by foreclosure it held property charged with trust for certificate holders, 128 C 361

—implied power in company if debt not paid to acquire property by strict foreclosure and then to sell it and distribute proceeds, 128 C 361

—receiver holds property with same powers and obligations, and court may authorize him to sell property even without consent of certificate holders, 128 C 361

—company entitled to receive its share of proceeds on certificates which it retained, though agreement provided that trustee should take them over if there was default,

where trustee did not take any action in matter, 128 C 361

—on application by receiver to sell property, certificate holders should be made parties; if too numerous, or other good reason, one or more may become parties for benefit of all or be so authorized by court, 128 C 362

—such authority not effective as regards those with opposing interest, 128 C 362

—if some become parties for all, court should order notice to give all holders opportunity to hear and be heard, 128 C 362

§ 5. Suits By and Against

judgment recovered in New York by receiver, in his own name, for same cause, *held* a bar to suit here, 28 C 433

—though Connecticut suit was in the name of the insolvent corporation, 28 C 433

previous fraudulent representations may be defense to suit by receiver, 29 C 384

may bring trover for a conversion prior to his appointment, 44 C 558

motion in error from decree appointing receiver operates as supersedeas, 47 C 173

receiver of foreign insolvent company may sue in this State, 48 C 401

—he alone can recover for materials and work furnished by him as receiver, 48 C 401

—creditor of company cannot factorize and appropriate such debt, 48 C 401

—immaterial that receiver was completing contract of the company, 48 C 401

—debtor not discharged by payment to factorizing creditor of such company, 48 C 401

—receiver not bound to notify his debtor not to pay to factorizing creditor, 48 C 401

statute de suits by receiver in name of company, is not a recognition of capacity of company to sue and be sued after decree annulling charter, 56 C 469

cannot be cited in where no leave of court secured; court cannot make order affecting him in action between other parties, 66 C 277, 82 C 363

cannot be affected by order in action in which he is sued individually and garnisheed as receiver, 66 C 283

issuance of injunction against receiver without first securing permission to sue; may be sued without such permission when, 68 C 543

—writ of prohibition denied where it appeared that property in suit never belonged to insolvent, and it did not appear that court requested to issue writ had appointed receiver, 68 C 543

receiver may appeal from void order or from one claimed to be void, which affects rights of owners and creditors, represented by him, 69 C 709

right of receiver to take appeal, 70 C 479

§ 5 Receivers

on change of, parties to pending action should be changed, 73 C 383

has no right of action on note assigned by insolvent, 74 C 317

right of receiver to sue, 74 C 657

in action by receiver of corporation; restrictions on stockholder's liability no longer hold, 75 C 441

parties necessary to action to apply funds of lessee railroad in hands of receiver to payment of claim for personal injury, 78 C 35

receivers cannot be sued without leave of court, 82 C 363

where receivers sue directors for negligence in management, corporation is considered to have known their acts and Statute of Limitations runs, 89 C 451

receiver of building corporation can sue for balance due from owner; validity of lien of another party can be determined in this action, 90 C 7

discretionary with court to permit receiver to be sued, 92 C 96

court, in possession of personal property of a creditor, should not permit him to sue for same in another court, 92 C 96

cannot litigate claim in another court without consent of court appointing him; consent may be nunc pro tunc, 93 C 165

judgment of a federal court can be enforced against receiver in another State only by intervening in receivership, 93 C 165

actions may be litigated in name of receiver or insolvent, and if latter, are fully binding, 93 C 166, 194

receiver need not show actual fraud if he sues directors for violating their position of trust, 94 C 384

when foreign receiver has absolute right to bring action in this State under full faith and credit clause; when only by comity, 104 C 665

New Jersey receiver appointed in voluntary dissolution of corporation can only sue here by comity, 104 C 665

—where effect would be to remove to New Jersey, out of reach of creditors and stockholders in Connecticut, corporation which succeeded one in dissolution, receiver denied right to sue, 104 C 665

analogy between superintendent of banks who has taken possession of bank and receiver, 119 C 83

—former is just as much a quasi or statutory assignee of right to enforce obligations as is receiver, 119 C 83

—and receiver being vested with right of action on behalf of creditors to enforce liability against stockholders, to deny him right to sue in courts of another State would be denial of full faith and credit clause in Constitution, 119 C 83

plaintiff moved appeal be erased on ground that R. F. C. was necessary party to determination of questions involved and was not made party; *held* while R. F. C. would not be bound, proper for court to give advice to receiver necessary to enable him to perform functions, 119 C 115

action in receivership is action in equity, 120 C 235

—court of equity does full and equal justice to all having interest in subject matter, 120 C 235

action by receiver of nonresident joint stock land bank joining as defendants stockholders residing in different counties, 121 C 220

§ 6. Rights of Creditors

§ 7. —In General

for most purposes receiver represents and stands in place of company, 52 C 361

—also represents creditors as against fraudulent acts of company and may repudiate such acts, 52 C 361

duty of receivers to convert assets and pay creditors pro rata, 56 C 239

receivers take, as officers of the law, possession of debtor's property for equal division among the creditors, 57 C 387

—appointment suspends creditor's right to attach, 57 C 387

funds in hands of receivers really belong to creditors; receivers are a mere conduit, 61 C 112

on insolvency, assets form trust fund for creditors, 66 C 18, 68 C 29, 72 C 658, 73 C 589, 90 C 343

creditors entitled to be heard and to appeal from orders in receivership proceedings; cannot individually sue stockholders; failure of receiver to sue, and other grounds for his removal, 66 C 277

receivership ends right of creditor to attach, 66 C 350, 70 C 232

how far receiver represents creditors, 70 C 231, 74 C 359, 370, 76 C 377, 88 C 194

rule as to imputing fraud from retention of possession not as fully applied to conveyance to receiver, 71 C 345

receivership as dissolving attachments in federal and state courts, 73 C 151

simple fact of insolvency of a corporation does not convert its assets into a trust fund for its creditors, 73 C 593

receivership is equivalent to attachment by all creditors, 74 C 370

equity treated as executed agreement of officer to take stock and surrender loan, in order to make company solvent, 76 C 367

bankruptcy within four months from receivership proceedings suspends them, and receiver should turn over property to trustee on order of state court, 84 C 712

- whether federal court can so order, quaere, 84 C 712
- dissolution of attachment made within sixty days of insolvency applies to estates of deceased as well as living persons, 90 C 323
- burden is on receiver to prove that pledgee had reasonable cause to believe that taking possession by him was an illegal preference, 90 C 417
- rights of citizens of this State to be protected as to their just claims, 104 C 665
- duty to discharge taxes rests on mortgagor or owner of equity; it is in power of court, in proper case, to direct receiver to use income and profits to pay taxes, 115 C 652
- unless payment of taxes becomes necessary while receiver is in possession to preserve security of mortgage, better practice is to await outcome of foreclosure before making order for their payment from funds in his hands, 115 C 652
- if mortgagee appropriates property by strict foreclosure and its value subject to lien for taxes exceeds debt he is entitled to nothing more, 115 C 652
- balance in receiver's hands should go to owner of equity or person succeeding to his interest, who may be second mortgagee, 115 C 652
- agreement whereby cash received for capital stock subscribed for by others, would be credited to balance due from certain subscriber, *held* fraud on creditors and not binding on receiver who represents them, 117 C 445
- creditors entitled to rely on subscription as part of capital assets, 117 C 445
- order for final distribution of assets of estate can only properly be made when all claims and expenses have been adjudicated, 120 C 235
- order to receiver to turn back assets to corporation in receivership after all claims paid or adjudicated sustained, 120 C 235
- though prior order, made before all claims were adjudicated, was to distribute them to stockholders, 120 C 235
- this is not final judgment, which could not be opened, especially as assets had not been actually distributed, 120 C 235
- and equity was done to all stockholders, including S who had note secured by stock, 120 C 235
- fact that R, whose signing personal note with company name had caused receivership, was still interested in corporation, *nil sig.*, 120 C 235
- § 8. —Claims
- creditor's rights to attach or levy suspended by appointment, 66 C 359, 70 C 232
- unsecured notes held by creditor as collateral security do not entitle him to dividend computed on actual debt plus these notes, 67 C 324
- rule as to secured creditors; foreign creditor garnisheeing debt due insolvent in his own State has no equity to have claim allowed here, 70 C 494
- where foreign creditor attaches property of insolvent in his own State, before receiver is appointed, he may prove balance of claim; but where insolvent has conveyed all property to receiver before attachment, he must first reimburse receiver, 71 C 345
- nonresident, to benefit by receivership, must renounce contrary claims, 71 C 345
- priority of claim for taxes; rights where corporation takes over property and assumes debt of partnership and then becomes insolvent, 72 C 57
- informality in statement of claim waived unless excepted to, 72 C 58
- submission of claims to court before paying them; receiver's own claim, 74 C 652
- effect of order allowing claim based on judgment, 74 C 652
- priorities between holders of railroad trust mortgage, supply creditors, other creditors, and persons who have advanced money for taxes, 76 C 11
- allowance of claim based on breach of contract by anticipation, 76 C 27
- cannot allow interest on claim reduced to judgment, where it is not included in judgment, 78 C 35
- claims to be equitably adjusted; set-off of claim of officer against insolvent corporation where judgment secured against officer, 78 C 442
- presentation of deposit book to receiver of savings bank is sufficient presentation, 81 C 261
- claims against an estate are presumed to have been seasonably presented, 81 C 592
- all creditors treated alike unless law says otherwise, 88 C 185
- rights of creditors to set-off, 88 C 185
- where assets are more than enough to pay claims, interest is allowed ratably on claims as due at date of receiver's appointment, 88 C 187
- request to compromise claims rests in discretion of court, which should consider all circumstances, 88 C 571
- its decision is not reviewable except for abuse, 88 C 571
- a subcontractor, whose contract is continued by the receiver of the general contractor, may file lien, 90 C 8
- after a concern becomes insolvent, bank can claim, under warehouse receipt, only what is described therein, 91 C 57
- where warehouseman did not take possession, actual or constructive, the delivery of his

§ 8 Receivers

- receipt to a bank is not effective in insolvency to give lien upon the goods, 91 C 57
- compromising a claimed lien with a receiver does not release indemnity company on its bond, 91 C 58
- in Connecticut, a creditor deducts value of his security from his claim unless he surrenders the security, 91 C 58
- on breach of continuing contract, claim accrues at once; past and future damages recoverable, 91 C 197
- extension of time for presenting claims is within court's discretion and is liberally used, 91 C 359
- a compromised judgment becomes an allowed claim and is treated as such, 93 C 165
- court can refer determination of claims to courts of other jurisdictions; or require them to be determined before itself, 93 C 165, 194
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- denial of application for extension of time to present claims does not prevent an application for an order to receiver to report the claims as already allowed where such allowance had been made without applicant's knowledge, 93 C 165
- where act of Congress gives exclusive jurisdiction to federal court to determine a liability, this law supersedes, 93 C 165
- in such case judgment is then to be presented to court of receivership by intervening petition, 93 C 165
- litigation of claim may be carried on in name of insolvent, 93 C 165
- consent to litigate claim in another court necessary; may be given nunc pro tunc, 93 C 187
- receiver defending claims in a foreign jurisdiction under order of court thereby recognizes that the claims are before him and he is bound by the judgment, 93 C 194
- court appointing receiver may determine how claims may be ascertained by itself or another court, 93 C 194
- liability on surety bond is fixed on default of principal, and claim is provable then though damages are unliquidated, 93 C 194
- a claim may take the form of a judgment though it is rendered after appointment of receiver, 93 C 194
- an unliquidated liability as surety where the principal defaulted before receiver was appointed for the surety, is provable for a dividend, 93 C 194
- claim on surety company bond to secure construction of a building is broken when contractor abandons work, 94 C 240
- if under law of State where bond is given, materialman might sue on it, he is entitled to share in funds though he could bring no action on the bond in Connecticut, 94 C 240
- provisions in bond for its assignment to materialman will not affect this result, 94 C 240
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- Legislature may prescribe order in which creditors of an insolvent shall be paid, 114 C 658
- common-law right of State to preference in payment of debts due it from insolvent except as abrogated by statute, 115 C 393
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- where one enters general appearance in receivership and actively contests claim of another in trial court and on appeal, he cannot be heard to say he is not party to action, 117 C 445
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- failure to give receiver remedy would force him to resort to courts of foreign jurisdiction, which would not be adequate, 117 C 453
- cross-complaint equivalent to bill of equity ancillary to receivership, 117 C 451
- appointment of receiver and his failure to adopt contract executory in whole or in part at that time, will ordinarily operate

as anticipatory breach and entitle other party to present his claim for damages, 123 C 74
 —but doctrine of anticipatory breach not extended to unilateral contracts unless promisor's duty is conditional on some future performance by promisee, 123 C 74
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 repudiation of lease by receiver of lessee at time when no rent was due did not constitute anticipatory breach, 123 C 74
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 —lessor not entitled to instalment, since it was not obligation in existence at date of receiver's appointment, 123 C 74
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RECEIVING STOLEN GOODS

See THEFT

RECKLESS DRIVING

See AUTOMOBILE §§ 15, 27, 28, 29; WANTON, WILFUL AND RECKLESS MISCONDUCT

RECKLESS MISCONDUCT

See WANTON, WILFUL AND RECKLESS MISCONDUCT

RECOGNIZANCE

See BONDS § 3

RECORD, AMENDMENT OF

See COURTS; JUDGMENTS § 19; JUSTICES OF THE PEACE; SUPERIOR COURT

RECORDS

- § 1. JUDICIAL RECORDS
- 2. OTHER RECORDS

See also APPEAL TO THE SUPREME COURT § 12; CORPORATIONS § 18; EVIDENCE §§ 21, 66; JUDGMENTS § 19; LAND RECORDS; PROBATE COURT § 6

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§ 1 Records

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§ 2 Records

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RECOUPMENT

See SET-OFF, RECOUPMENT AND COUNTERCLAIM

REFEREES

See COMMITTEES AND REFEREES

REFORMATION OF INSTRUMENTS

- § 1. IN GENERAL
- 2. DEEDS AND MORTGAGES
- 3. OTHER INSTRUMENTS

See also DEEDS § 14

§ 1. In General

equity will correct mistake in written instrument, K 401
parol evidence inadmissible to show mistake in law as ground for reforming written instrument founded on such mistake, 9 C 96
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courts should exercise great caution, 49 C 171
no writing is beyond reach of a court of equity if prayer for reformation is duly presented and supported by convincing evidence, 54 C 500
—but presumption is in favor of the writing and therefore the evidence should be overwhelming, 54 C 501
when exactly as parties intended, no change can be made, 55 C 385
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reformation of instrument where scrivener makes mistake; judgment for damages, 69 C 62
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reformation on grounds of mutual mistake requires no allegation of fraud, 85 C 84
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reformation on ground of mutual mistake; mistake must be common to both and this should be clear, substantial, convincing from evidence; both should do what neither intended, 85 C 84
mistake of one party is not ground for reformation but for cancellation, 85 C 84
equity cannot reform a written instrument by introducing terms derived from parol evidence, 95 C 211
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when equity will reform instrument; acts and declarations of party as evidence of his claims and attitude, 96 C 566

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when reformation granted on ground of mutual mistake; proof must be clear, substantial and convincing, 104 C 36

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unjust enrichment by reason of innocent mistake without negligence as basis for reformation of instrument, 110 C 319

where there is apparent error upon the face of the instrument, ordinary principles governing reformation for mistake have little application, 114 C 100

to warrant reformation on ground of mutual mistake, mistake must be common to both parties, and it must appear that both have done what neither intended, 123 C 368

—negligence may not of itself be sufficient ground for refusing relief if it appears that other party has not been prejudiced thereby, 123 C 368

§ 2. Deeds and Mortgages

equity will grant relief against mistakes of scrivener in drawing deed and against person who attempts to take advantage of mistake, 2 R 415

equity will relieve for mistake in deed, 2 R 503, 1 D 139, 7 C 549, 21 C 145, 23 C 538

—aliter, if parties intended deed to be so, and grantee may retain in good conscience, 21 C 145

equity will correct defective deed to one of several grantees in lieu of testamentary devise, 3 D 410

equity will correct mistake in description of note in mortgage, 3 C 149

equity will relieve when deed is attested by incompetent witness, 4 C 346

equity will supply defect of statutory requirement in deed as against grantor; request for rectification by grantor is unnecessary, 5 C 471

equity will correct mistake in attestation of deed, 8 C 554

equity may remedy imperfect execution of a deed as against subsequent purchasers with notice, 14 C 135

deed may be corrected for mistake, as against party, his heirs, and even third persons, 17 C 559

incomplete condition in mortgage may be reformed and property foreclosed, 18 C 107

when mistake in deed may be corrected against protest of adverse party, 18 C 108

when mistaken reference to date of prior deed may be remedied at law, 18 C 213

equity will correct deed for mistake where error is either of fact or law and deed does not express intent of parties, 21 C 145

equity will correct erroneous location in deed, if the result of fraud or mistake, 21 C 591

—in favor of creditor levying on land as conveyed, 21 C 592

equity relieves against mistake of fact though mingled with one of law, 39 C 326

—reformation of deed intended to convey right of way appurtenant, 39 C 325

incumbrance not stated as fully in deed as in agreement may be corrected, 41 C 133

where mortgage sought to be reformed and foreclosed was witnessed and acknowledged, but by accident not signed by mortgagor, equity could not furnish relief, 44 C 321

equity will reform deed which fails through mistake of draftsman to convey all land intended, 49 C 502

—in action against grantee to recover possession and mesne profits, 49 C 505

—parol evidence of mistake admissible, but should be clear and satisfactory, 49 C 504

omission by mistake of parcels of land in deed; court may decree conveyance of land so omitted, 50 C 159

—allegation *held* sufficient to support decree, 50 C 159

—also to constitute cross-complaint for affirmative relief, 50 C 161

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—reformation incidental to foreclosure, 54 C 33

question de sufficiency of the form of a deed is not at all affected by the fact that it was given to defraud creditors, 54 C 331

where condition was expressly left out of deed and incorporated in a written agreement, there is no ground for reformation, 55 C 385

failure of husband to join wife in deed to husband is a mistake of a statutory requisite to be remedied, where justice requires, 59 C 117

—immaterial that it is a mistake of law, or that husband did not offer to join, 59 C 117

facts *held* to show existence of mistake de boundaries of land, 60 C 171

—sufficient to reform deed and carry out parol understanding de boundaries, 60 C 171

—purchaser of grantee entitled to reformation and also to damages for a breach under deed as reformed, 60 C 171

—as against a remote grantor by a like deed, 60 C 192

§ 2 Reformation of Instruments

action for reformation lies by one privy in title with original parties, 60 C 193

facts *held* to show no laches by grantee of deed in suit for reformation, 60 C 193

reformed deed properly held to relate back to date of its original delivery; but not to create an obligation of warranty by such relation at such time, 61 C 411

cross-complaint for reformation is proper where plaintiff seeks to give instrument different meaning from that intended, 76 C 322

proof requisite; one who is entitled to conveyance is entitled to one under seal, 77 C 384

deed can be reformed to convey all grantor's interest in certain real estate received by inheritance, 83 C 347

condition of mortgage not reformable in absence of fraud or mistake, 100 C 679

deed based on mistake common to both parties reformed; as where parties prepared deed according to old map which contained more land than either intended, 101 C 44

to secure reformation of instrument, mistake must be common to both parties and cause result neither intended, 104 C 36

—not granted to reform deed where mistake was not as to property to be conveyed but as to effect of its location or intended use, 104 C 36

—as where expected means of ingress to and egress from highway does not result, 104 C 36

—in such case if grantor voluntarily supplies needed means he does full duty, 104 C 36

bill for reformation, on ground of mistake, to be liberally construed to give effect to any equity, 109 C 292

—allegations of agreement to include certain rights of way in deed, their omission, demand by plaintiff for correction and its refusal *held* to afford sufficient basis, 109 C 292

—mistake on one side and attempt to take inequitable advantage on other is sufficient, 109 C 292

—where complaint also contained allegations of fraud, and court charged jury fraud not necessary, not error not to specifically charge them to disregard allegations, 109 C 292

reformation of deed of land “together with right to pass and repass” to include rights of way for other contiguous land of grantee, 109 C 292

correction of misdescription in deed against holder of subsequent quitclaim with notice of claim, 110 C 374

merely alleging that a bonus was added to a mortgage, under agreement that payment would not be demanded for certain time, not

basis for reformation of note and mortgage, 112 C 439

reformation appropriate in cases of mutual mistake, where in reducing an agreement to writing the instrument fails to express the real agreement or transaction, 120 C 6

—it is also available when instrument does not express true intent owing to mistake of one party coupled with fraud, actual or constructive, of other, 120 C 6

—fraud includes not only known misrepresentation but also concealment or nondisclosure, 120 C 6

—so where defendant accepted authorization for delivery of bonds by plaintiff in amount of \$4750 for release of his mortgage, agreement being bonds for \$3950, and mistake due to plaintiff's clerk, defendant's conduct was unconscionable and reformation granted, 120 C 6

where defendants did not intend to buy or plaintiffs to sell strip of land and there was mutual mistake in supposing the deed did not convey it, reformation granted, 123 C 368

—neglect of plaintiffs to verify by survey actual bounds of premises conveyed did not defeat right of reformation, 123 C 368

plaintiff's claim of mutual mistake in original conveyance of lot to which it was successor in title not within issues of pleadings, 129 C 20

§ 3. Other Instruments

equity will correct mistake in will where apparent on its face, 6 C 34

equity may reform writing intended as bond where seal was accidentally omitted, 7 C 549

equity will supply word “heirs,” omitted by mistake, 10 C 253

mistake in a trust corrected for defendant as well as for plaintiff, 10 C 254

bill for correction of mistake in distributor's return is not maintainable, 17 C 392

—remedy is by appeal from probate, 17 C 392

if agreement for sale of land is by mistake; not in accordance with intention of parties, equity will not, by aid of parol evidence, reform it, 19 C 63

assignment on insolvency will not be reformed as against creditors; aliter, as affecting insolvent only, 20 C 102

contract not reformed for mistake, unless unconscionable advantage be meditated, and if it be possible of execution, 26 C 19

effect of conveyance to stranger, on bill to correct lease, 27 C 622

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clear proof of verbal alterations in written contract required, 37 C 30

Reformation of Instruments § 3

equity will treat joint bond as joint and several, when, 38 C 317

—will reform same as against sureties as well as against principal, 38 C 318

to warrant reformation of a contract, mistake must have been mutual, 49 C 171

—mistake by one, or a misunderstanding, is insufficient, 49 C 171

—mistake must be material and variance clearly established, 49 C 171

—facts *held* insufficient to justify allegations of mistake, 49 C 172

rule that mistake must be mutual *held* not to apply to omission of redemption clause in town bonds, 52 C 495

—where there was no fraud or recklessness and where purchaser had knowledge of all the facts, 52 C 492

contract for renewal of insurance on original terms; material change in new policy which insured failed to read; loss by fire; policy reformed, 54 C 497

statute de disseisin does not extend to a bill for reformation, 59 C 139

—administrator of petitioner, as such, *held* not entitled to relief or a judgment for benefit of heirs, 59 C 139

where purchaser has paid a valuable consideration of which vendor received the benefit, took possession, made valuable improvements, etc., equity will remedy a defect in the power to sell, 61 C 483

contract de tool steel reformed in equity on parol evidence of mutual mistake, 64 C 29

a complaint, asking that a bond good in all events should be declared good only as against party having interest in the property, is not demurrable, 85 C 83

reformation of insurance policy; estoppel to claim depends on actual or imputed knowledge of facts, 91 C 410

failure of insured to read policy not necessarily a defense, 91 C 410

contract reformed for mutual mistake when it was common to both and because of it both did what neither intended; evidence must be clear and convincing, 96 C 566, 97 C 340

insurance policy reformed as company not presumed to issue one that is self destructive; explainable only on ground of deception or mistake, 97 C 341

absolute waiver of mechanic's lien will not be reformed to limit its effect among lienors, 101 C 92

mistake must have been common to both parties, not unilateral, for reformation of contract, 102 C 370

insurance policy cannot be reformed to set forth true state of insured's title where no mutual mistake, 102 C 370

equity cannot reform contract in absence of fraud by introducing new terms and then

enforce it as sufficient under Statute of Frauds; nor can such a claim prevail when interposed as a defense to an action by other party, 103 C 285

mistake of one party not ground for reformation of contract but may be for cancellation, 107 C 387

—mistake in addition of items of estimate, which other party had good reason to know and which was promptly pointed out to him when discovered, 107 C 387

—where agreement executed and party not prejudiced, rescission proper, 107 C 387

—mistake, while somewhat negligent, not so culpable as to bar relief, 107 C 387

—when relief will be barred because of party's neglect, 107 C 391

insurance policy not reformed to change name of insured to enable suit to be brought for loss not within its terms, 107 C 446

award of arbitrators partly in writing need not be reformed to include oral part; defendant may prove nonperformance as equitable defense, 108 C 478

failure of town officials to read bonds of tax collector till dispute arose as not barring relief by their reformation, 110 C 319

where surety company, instead of writing bonds covering tax collection as to property tax and personal tax, wrote them to cover collection of tax on real property and tax on personal property, court reformed them, 110 C 319

—knowledge of agent of company as to character of bonds wished imputed to principal, 110 C 319

court properly corrected attachment bond obligating parties to pay interest of plaintiff in the property by substituting defendants' names, 114 C 98

—merely ascertaining real meaning of contract, 114 C 98

conclusion of court that there was no mutual mistake in compensation policy, which as written did not cover obligation under compensation laws of both Vermont and Connecticut, to justify reformation of policy, upheld, 120 C 503

relief afforded is to make instrument conform to previous agreement of parties, 125 C 440

—definite agreement on which minds have met must have pre-existed instrument in question; court cannot supply agreement which was never made, 125 C 440

—so where casualty company misconstrued request for bond as calling for different undertaking than plaintiff meant and executed an inappropriate bond, no reformation granted, 125 C 440

in action for reformation of policy and damages, where plaintiff makes general claim

§ 3 Reformation of Instruments

for jury, in absence of court order that all issues be so tried, request has only effect that jury determine legal issues after reformation issue has been determined by court, 126 C 570

—if whole case be tried to jury equitable issues should be submitted them on interrogatories, upon answers to which court can base judgment on reformation, leaving issue of liability on policy as reformed to be determined by verdict, 126 C 570

there was no oral agreement between plaintiff's broker and fire insurance agent that policy should be issued which would at all times cover building under construction, jus-

tifying reformation of policy on ground of mutual mistake, 129 C 147

reformation of agreement cancelling former agreement pertaining to royalties granted where, by mistake, scrivener recited previous agreement already cancelled, 129 C 295

—defendant's contention that plaintiff did not come into equity with clean hands because it was getting his inventions by devious means, overruled, 129 C 300

—and in absence of fraud, duress or like inequity there was not such gross inadequacy of consideration as would bar equitable relief, 129 C 295

REFORMATORIES

no appeal lies from judgment of justice committing boy to reform school, 51 C 477

proceeding for committal to reform school *held* not a criminal one, 51 C 477

—any person may bring matter before justice, 51 C 477

—makes no difference that one assumes to act as grand juror, 51 C 477

no objection to commitment that parent is deprived of services of son, 51 C 478

statutes de commitments to reform school *held* valid, 51 C 478

transfer of child from Connecticut School for Boys or Long Lane Farm to county home does not divest child of guardianship of these institutions, (dis.) 110 C 478

deferring sentence after conviction for a few days, during which defendant became sixteen years of age, then sentencing 'o Connecticut Reformatory, improper, 115 C 596

inmate is one sentenced to institution until released from its control, including one on parole, 116 C 136

statute permitted directors to transfer to state prison inmate who refuses to obey regulations or appears to be incorrigible, valid, 116 C 136

—possibility of transfer incident to sentence and determination may properly be left to directors, 116 C 136

—function one of administrative nature, 116 C 136

—and regulations referred to include those which govern conduct of prisoner while on parole, 116 C 136

where inmate of reformatory on parole com-

mits another offense and is sentenced to state prison, upon discharge he is again subject to control of officers of reformatory and to transfer to prison, 116 C 136

—and instructions to state prison to hold him on his discharge, as inmate of reformatory transferred to it, would be valid, 116 C 136

vote of directors of reformatory that prisoner serving sentence at state prison "be transferred" to state prison to serve balance* of reformatory sentence, to take effect after expiration of sentence he was then serving there *held* valid, 116 C 136

—vote was authorization of future transfer and within power of directors, 116 C 136 where inmate of reformatory is transferred to state prison the maximum term of his sentence is not affected, 116 C 136

sentences to reformatory are indefinite, law fixing maximum period; directors may parole inmate at any time; after breach of parole time on parole is not counted in determining period he has served, 116 C 136

—these incidents of sentence to reformatory are effective after transfer of inmate to prison, 116 C 136

in case of inmate of reformatory transferred to prison, and also serving state prison sentence, the two sentences should be regarded separately in computing time earned for good behavior, 116 C 136

prisoner held at state prison after serving sentence there, for completion of reformatory sentence, *held* not entitled to release under facts, 116 C 136

REGISTRAR OF VOTERS

See ELECTIONS AND ELECTORS; PUBLIC OFFICERS § 13

REIMBURSEMENT

See CONTRIBUTION AND REIMBURSEMENT

RELEASE AND DISCHARGE

- § 1. IN GENERAL; WHAT CONSTITUTES
 2. VALIDITY
 3. OPERATION AND EFFECT

See also ACCORD AND SATISFACTION; BANKRUPTCY § 5; BILLS AND
 NOTES § 18; GUARANTY § 6; MORTGAGES § 17;
 PAYMENT; SURETYSHIP § 3

§ 1. In General; What Constitutes

benefit of discharge *held* waived by failure to plead it, K 363

—consideration of agreement effecting discharge may be used as set-off, K 363

receipt “in full satisfaction of all demands” is a discharge, 1 D 275

sale and assignment of promissory note for full value thereof, by one assignee to a subsequent one, does not, of itself, imply warranty that maker, having notice of such sale and assignment, shall not take discharge from payee, 4 D 100

receipt in full, with knowledge of all circumstances, is a discharge, 9 C 401, 19 C 177, 26 C 487

—is pleadable in bar, 13 C 143, 21 C 204

covenant not to sue is, in equity, a release, 29 C 26

receipt, to operate as accord and satisfaction or release, must be specially pleaded, 67 C 35

definition; consideration, 79 C 405

release of principal on a bond must be pleaded, 91 C 343

surety company, giving bond to protect customers of a private banker under statute, not released by statute's repeal, 95 C 10

in action by testamentary trustee, a release stating that an agreement had been made whereby certain sums advanced by him to beneficiaries should be repaid in installments is not a discharge of his claim, 95 C 588

—widow must make payments therein provided, although no express promise is contained in it, 95 C 588

—but it does include payments to widow of income which ought to have gone to pay charges on property, 95 C 588

—as these give rise to claim against her when made, if at all, 95 C 588

—nor is she estopped to claim, in absence of proof that she knew of wrongful receipt of commission by him, that these were not included in the release, 95 C 589

giving a statutory bond in place of a bond given to release attachment is a release of the former, 96 C 469

acceptance by plaintiff of payment based on engineer's final estimate of work not release of his claim for additional war costs

when neither party intended it to have that effect, 121 C 163

in action for rescission of contract, a party, as condition precedent, must restore or offer to restore other party to his former condition as nearly as possible, 122 C 429

—but in actions for personal injuries there is disagreement whether restoration or offer to restore consideration of a release is condition precedent to right to maintain suit upon original case, 122 C 429

—unnecessary to determine whether allegation of tender was required and effect of its absence where pleadings did not raise question and no such point was made at trial and no requests to charge, 122 C 429
 amount paid for a release which is unsuccessfully set up as defense should be credited on verdict, 122 C 435

§ 2. Validity

where discharge is explicit, no parol evidence admissible to show extent of it or contradict the writing, K 291

equity will not relieve against fraudulent discharge of assigned note, by promisee, 1 R 390

—unless promisee be insolvent, 1 R 390, 2 R 123

plaintiff may discharge action brought in his name on note, notwithstanding note is assigned and plaintiff insolvent, 2 R 269

fraud in obtaining discharge from bankrupt joint covenantee, is actionable, 4 D 6

discharge by assignor after assignment; no action lies if note be void for usury, 5 D 128

fraudulent discharge by one of joint covenantees to covenantor who had parted with his interest by assignment, 1 C 285, 2 C 324

where discharge was an escrow, to take effect when present action was terminated, it could not be pleaded in the action, 1 C 375
 a release of all demands is insufficient without delivery, 1 C 381

parol contract after breach cannot be released by parol, 2 C 138

—aliter, before breach, 2 C 138

parol agreement between creditor and debtor that former will collect no part of debt is not effective release, 6 C 14

discharge of assignor after notice, *held* no defense in ejectment, 13 C 569

§ 2 Release and Discharge

discharge obtained by fraud from nominal plaintiff, of no avail to defendant, 14 C 124

discharge by wife after divorce does not affect suit by husband's assignee in name of husband and wife, by statute, 22 C 66

an executory contract, under seal, cannot be discharged, or released, by an executory verbal contract, 24 C 624

parol evidence admissible to show discharge in full was given on promise to pay a debt then due, 32 C 56

payment of part *held* no consideration for discharge of whole debt, 38 C 498

trustee of insolvent company *held* not estopped by discharge of director's stock note by company, 38 C 498

legatee signing discharge of all claims against estate under mistake as to her legal rights was not bound by it, 56 C 153

release made by one afterwards appointed administrator not binding on him in that capacity, 70 C 67

where claim is unliquidated, amount of consideration is of no consequence, 79 C 405, 85 C 579

whether defendant can make use of release on hearing in damages, *quaere*; if so, plaintiff can show facts making it invalid, though not pleaded, 81 C 423

release of liability for personal injury given by child unacquainted with English, and under hardship, may well be set aside, 81 C 423

voluntary payments made to secure invalid release need not be returned as condition precedent to disavowal, 81 C 423

written release of an obligation not under seal does not discharge the obligation unless given for good consideration, 85 C 534

fraud must be pleaded to be claimed, 85 C 579

seal imports consideration and forbids modification of terms, 89 C 74

agreement to release a principal which is without consideration is of no validity and will not release surety, 93 C 559

—so, to have that effect, it must be absolute and unqualified and contain words of present discharge, 93 C 567

attempted release of a sewer assessment *held* void, 95 C 311

a present release of an equity of redemption by mortgagor to mortgagee for a consideration is valid, 96 C 696

release is invalid, when procured through false representations as to its effect, 106 C 72

fraud inferable from gross inadequacy of consideration, 106 C 72

when release procured by fraud, adverse inference on question of liability may be drawn, 106 C 72

where contract to release judgment is executory, there is no release until it is performed, 112 C 58

release clause in mortgage not enforceable where mortgagor is in default, 114 C 467

charge of court upon issue of fraudulently obtaining release of liability, sustained, 115 C 513

effect of seal upon release, 121 C 183

release did not discharge indebtedness where delivered in escrow upon condition never fulfilled, 126 C 48

award by stipulation in which parties agreed that payment should be in full and final settlement was subject to modification for mistake though it constituted a release in full, 128 C 574

in absence of fraud or coercion, adequacy of amount paid to settle claim of no consequence if demand was wholly unliquidated, 129 C 403

—if consideration grossly inadequate it could have bearing on whether release obtained by fraud, 129 C 403

—inadequacy may be so gross or shocking as to be of itself a badge of fraud or it may tend to establish constructive fraud, 129 C 403

§ 3. Operation and Effect

discharge of one of debtors for portion of debt is discharge only of such part, and the person discharged, as well as other debtors, are still liable for remainder, K 44

receipt to a joint obligor of his part is no discharge of the other, 1 R 72

receipt in full of all demands *de bond* conditioned to pay sum annually discharges all sums due on bond but not bond itself, 1 R 235

receipt in full of all book accounts "and of all other demands" discharges a trespass, 1 R 271

discharge of all demands discharges special promise to pay interest on note, though note itself be excepted from discharge, 1 R 384

release of one joint debtor on execution is a discharge of both, 1 R 502

promise made in consideration of discharge is not cut off by the discharge, 2 R 76

a discharge in full of all demands effective as to all claims then existing, 2 R 296

general words in release construed most strongly against releasor, 2 C 122

—qualified by preceding particular recital, 2 C 122

discharge of debtor on execution is a technical satisfaction of debt, 8 C 429

—debt not extinguished thereby; guarantor still liable, 8 C 429

release by A to B concerning estate was personal between them and did not affect

Removal of Causes

- claim of E against F relating to same estate, 16 C 12
- discharge of one joint trespasser is a discharge of all, 31 C 447
- though several suits be pending against several joint trespassers, 31 C 447
- and though both parties intend simply a discharge of that one suit, 31 C 447
- creditor could collect debt out of partnership assets after one partner discharged from his individual liability, 39 C 573
- discharge of all demands governs those existing at time it is given but not those originating at that time or subsequently, 45 C 99
- effect of releasing one joint tort-feasor, 67 C 256, 79 C 405, 89 C 74, 95 C 79
- effect of release by one tenant in common, 73 C 362
- effect, 79 C 405
- a release in full is pleadable in discharge of debt, 85 C 679
- release of one joint tort-feasor is release of all and implies full satisfaction received by all, 89 C 74, 95 C 79
- if a release reserves right to pursue other joint tort-feasor, full satisfaction for injury is not assumed; payment is a release only pro tanto, 89 C 74
- nature, extent and legal effect of release is decided by its terms, 89 C 74
- rights of which releasor is ignorant are not surrendered by general release, 95 C 79
- ignorance is a question of fact, 95 C 79
- general words of release are limited to things within contemplation of parties, 121 C 163
- dispute which has not arisen not concluded by anticipatory words of general release, 121 C 163
- receipt for \$500 upon facts did not constitute complete discharge and release of claim for legal fees, 126 C 154
- acceptance of work with authorization of final payment and release of bond *held* not intended to release contractor from liability in suit based on failure to maintain road closure signs, 126 C 350
- where particular recitals precede general words a release will be restricted to matters particularly recited, 128 C 577
- but this technical rule is subordinate to broad rule that intention of parties which words of instrument express, in light of circumstances existing at time, shall prevail, 128 C 577

RELIGIOUS SOCIETIES

See CHURCH AND ECCLESIASTICAL SOCIETIES

REMAINDERS

See LIFE TENANT AND REMAINDERMAN; TRUSTS; WILLS § 40

REMITTITUR

See APPEAL TO THE SUPREME COURT § 48(3); VERDICT § 21

REMONSTRANCE

See COMMITTEES AND REFEREES

REMOVAL OF CAUSES

- cause brought by citizen of State against citizen of same State jointly with citizens of another State is not removable to United States Circuit Court, 2 R 444
- quaere as to removal of flowage petition to United States Court, 35 C 509
- transfer of jury case to another county; may be after trial and disagreement, 44 C 35
- issue joined to jury generally is sufficient on transfer, 44 C 35
- record need not show reasons for transfer, 44 C 36
- transfer is in discretion of court, and not reviewable, 44 C 36
- construction of act of Congress de time within which application must be made to remove causes, 51 C 486
- must be made at term during which cause is first triable, according to rules and practice, 51 C 486
- Superior Court cannot remove or prevent removal of cause, 54 C 32
- its action in permitting removal does not abate suit or erase it from docket for want of jurisdiction, 54 C 32

Removal of Causes

- if cause is legally removable, compliance with federal statute removes it, 54 C 32
- if not removable compliance with federal law does not effect a removal, 54 C 32
- in such case no order of state court is necessary to reinstate case on docket, 54 C 32
- second application for removal *held* properly refused on ground urged, 54 C 32
- whether an application for mandamus may be removed from state to United States court, *quaere*, 59 C 84
- if plaintiff and defendant are citizens of same State, United States courts have no jurisdiction, 65 C 162
- mere statement that plaintiff had no interest in transaction will not avail, 65 C 162
- when petition is to be filed; amendment of petition; filing of record in United States court of no avail if case is not removable, 65 C 162
- federal question; should appear in complaint; who may remove, 71 C 339
- if not removable, filing of petition or application for certiorari from United States court will not prevent case from being proceeded with in state court, 71 C 339
- answer cannot be treated as equivalent to stipulation for transfer of cause, 74 C 90
- statute permitting “court” to transfer action

- beyond its jurisdiction to proper court included justice of the peace, 105 C 671
- costs in such case, 105 C 671
- defect does not destroy jurisdiction, 105 C 671
- order may be made any day to which case is returned, 105 C 671
- transfer made under statute taking effect upon its passage affected by act passed at same session but taking effect after transfer made, 108 C 74
- act general in its terms court will not assume to be intended only for certain pending cases, 108 C 74
- transfer from Superior Court in one county to Superior Court in another affects venue, not jurisdiction, and defect may be waived, 108 C 74
- unless statutory requirements as to notice on removal of action from Common Pleas Court to Superior Court are complied with, latter lacks jurisdiction of action, 117 C 39
- under acts of Congress, assignment made simply for purpose of creating diversity of citizenship will not afford basis of removal from state to federal courts, 122 C 583
- but assignment made to avoid such diversity will be effective to prevent removal, 122 C 583
- right of removal not absolute but is qualified and subject to defeat, 122 C 583

REPLEVIN

- § 1. IN GENERAL
- 2. WHEN IT LIES
- 3. DEMAND AND REFUSAL
- 4. REMEDIES OF DEFENDANT; BONDS AND ACTIONS THEREON; RETURN OF PROPERTY
- 5. PLEADING AND PRACTICE

§ 1. In General

- writ of replevin is demandable of right, 9 C 145
- action of replevin examined and explained, 14 C 114
- attachment suit withdrawn prior to service of replevin writ; officer may return goods to party defendant in that suit, 31 C 118
- rules of jurisdiction applicable to the four classes of cases of replevin, 38 C 245
- statute de replevin *held* not retroactive, nor applicable to pending cases, 44 C 175
- prior to 1863, replevin would lie only to recover animals impounded and goods attached, 54 C 318
- in 1863 the writ was extended to any goods unlawfully detained from owner, 54 C 318
- history and nature of remedy, 66 C 542
- injunction against threatened action of, refused, 76 C 79

- action of replevin is an election to rescind a sale, 91 C 482
- effect of proof of claim in bankruptcy against original vendee's estate for portion of goods upon replevin against sub-vendee chargeable with notice, 91 C 489
- whether defrauded vendor under severable contract of sale partially performed, must retake all the goods, upon rescission, *quaere*, 103 C 413
- purchaser from conditional vendee with knowledge cannot invoke statute in replevin action by vendor, since its purpose and effect is limited to creditors and bona fide purchasers, 117 C 163
- scale sold vendee was replevied by H but vendee won suit though scale not actually returned; *held* vendee failed to sustain burden of showing title in H superior to that of defendant vendor in suit for breach of warranty of title, 118 C 474

effect of notice to vendor of pendency of replevin action against vendee and demand that he defend it conclusively binds former to judgment therein, 118 C 477

replevin by trustee under Uniform Trust Receipts Act of automobile against buyer "in the ordinary course of trade" from trustee; "new value," 125 C 626

§ 2. When it Lies

will not lie between joint owners of chattel, 12 C 331

does not lie in favor of one having lien on goods attached, 16 C 87

lies only in favor of owner with title, 16 C 87, 20 C 364

attaching officer not liable in replevin, 18 C 550, 20 C 343, 45 C 157

does not lie against lawful impounder, for illegal detention by poundkeeper, without his knowledge, 24 C 358

convenient mode of trying titles between attaching creditor and some third party claiming title, 31 C 120

lies by trustee, for trust property attached as his, 36 C 10

—so by husband as trustee for wife, 36 C 10, 105

—and without joining wife, 36 C 10, 105

plaintiff entitled to remedy instantly property is levied on, 36 C 10

—this right is not affected by officer's subsequent errors, 36 C 10

distraint for rent unknown in this State; replevin lies, 37 C 177

prior to 1874, did not lie for property taken on execution, 39 C 213, 41 C 321, 44 C 175

—nor for goods taken on tax warrant, 44 C 175

right to immediate possession is necessary at common law, 42 C 75, 60 C 463

—aliter, by statute, 42 C 75

maintainable by receiptor bound to deliver to officer on request, 45 C 103

—goods receipted in Massachusetts and delivered to debtor who sells them here; law of this State governs as to receiptor's right to sue, 45 C 103

to be brought against attaching creditor, not the officer, 45 C 157

not maintainable by purchaser of stolen goods against officer holding them for identification, 45 C 547

does not lie for liquors seized for condemnation, 48 C 174

lies to recover goods or chattels held on execution, 49 C 110

will not lie for spirituous liquors kept to be sold in violation of law, 49 C 164

—as against levying creditor of the possessor of the liquors, 49 C 164

plaintiff must have a general or special property in some particular goods which must be described, 54 C 317

is founded on tort; a tortious taking or detention of property is essential, 54 C 319

will not lie to enforce a contract or to recover damages for its breach, 54 C 319

does not lie for an undistinguishable portion of cider brandy not set apart for plaintiff, 54 C 319

plaintiff must have a general or special property in the chattels with a right to their immediate possession, 60 C 463

—pledgee's right, if proved, is sufficient to maintain, 60 C 463

—but a mere executory contract is not an actual pledge; and until delivery pledgee cannot maintain, 60 C 463

lies by original vendor of chattels sold under a conditional sale not recorded, against bona fide purchaser from the conditional vendee, 63 C 433

—Chapter 147, Public Acts of 1893, does not apply to "the vendor and his heirs," 63 C 433

money, which has passed into general circulation, cannot be reached, 66 C 500

may be brought by person claiming right to possession against attaching officer, 68 C 9

mortgagee out of possession cannot recover fixture severed by mortgagor, 72 C 464

defrauded vendor may maintain replevin against fraudulent vendee or against mala fide purchaser from latter without reimbursement for freight charges, 73 C 547

—ratification of sale after discovery of fraud, 73 C 547

for liquor license, 74 C 392

cannot reach fixture attached to realty, 75 C 170

lies against several where one of defendants has refused delivery and others claim under him, 77 C 462

where brought to recover goods from retail dealer and he has replaced some of those sought by others of like kind, latter are recoverable, 79 C 434

does not lie where possession originally rightful unless converted into a wrongful one, 83 C 159

A sold and delivered goods to B but was not paid for them; later B sold them to C, and A tried to replevin them; *held* he could not, 86 C 372

after one has surrendered property in accordance with an officer's receipt, he can then bring replevin for it, not before, 90 C 570

whether it would lie for property seized and held under a prior writ, *quaere*, 91 C 320

suit abandoned; goods pass at once into constructive possession of defendant, 99 C 262

—plaintiff may again replevy, without an actual restoration of the property, 99 C 262

§ 2 Replevin

- of motor truck after payment of repairs and storage or tender thereof, 99 C 262
 - P, conditional vendor, replevied car from A, who attached it as creditor of conditional vendee's mother; contract not executed or recorded as required by statute; *held*
 - as A's attachment was not in action against one having attachable interest in car, he cannot invoke statute, 117 C 159
 - P not guilty of connivance in securing default or of bad faith in recording contract after attachment, 117 C 159
 - one in possession of stolen property may not ordinarily assert any claim to it as against owner, 121 C 188
 - but where he has acted in good faith he is not debarred from claiming parts added to it, as would be the thief, 121 C 188
 - so where defendant purchased stolen car in good faith except engine which was installed by H and could be removed, *held* real owner of car not entitled to engine on replevin, 121 C 188
 - deputy sheriff did not have to show reliance on apparent ownership of car by attaching creditor or himself to take advantage of defective bill of sale, 127 C 199
 - plaintiff must prevail by strength of his title rather than weakness of defendant's; he must show immediate right to possession at time of bringing action, 128 C 195, 508
 - where conditional sale contract on which plaintiff relied was part of general scheme to defraud creditors, he could not prevail in replevin action, 128 C 195
 - where plaintiff caused cars to be registered in wife's name to avoid attachment, he could not assert superior right to possession, as against attaching creditor, growing out of his own fraud, 128 C 506
 - that he kept sufficient property in own name and in visible possession to satisfy creditors, *nil sig.*, 128 C 509
 - creditor who attaches property cannot ordinarily hold it against one having equitable title unless he has given credit in reliance upon apparent title, 128 C 508
 - creditor of conditional vendee attaching goods sold can only claim rights of latter and is limited by conditions of conditional sales contract, 129 C 229
 - conditional vendor could prevail against attaching officer where vendee was not in default and officer did not tender unpaid balance of purchase price, 129 C 229
- ### § 3. Demand and Refusal
- no demand is required as against fraudulent vendee, 38 C 490
 - nor as against bad faith vendee of such vendee, 38 C 490
 - aliter, as against bona fide purchaser for value, 38 C 490

- lease with agreement for sale on performance of conditions; no demand required if lessor entitled to possession on breach, 40 C 148
- previous demand not necessary, when, 42 C 415
- sale with right to retake on default; purchaser from vendee must prove a consideration and his good faith, 43 C 512
- in absence of such proof, no demand is required, 43 C 512
- demand required where cattle escape from pound to owner's premises, 45 C 166
- the office of a demand is not to make defendant's possession wrongful, but to furnish evidence that it was so, 54 C 313
- husband's refusal to deliver to plaintiff on wife's demand in plaintiff's name, is evidence of wrongful possession by husband, 54 C 313
- demand and refusal are prerequisite to action of replevin, 86 C 373
- necessity of pleading and proving demand and refusal, 102 C 612
- demand for possession by conditional vendor not necessary where he has right to immediate possession under terms of the agreement, 105 C 671
- in action for conversion of stolen property which has been purchased in good faith, or in replevin of it, demand and refusal before suit must be shown, 121 C 188
- but while defendant is entitled to such demand this is not element of owner's cause of action and latter need not allege it, 121 C 189
- filing general denial does not raise this issue, 121 C 188

§ 4. Remedies of Defendant; Bonds and Actions Thereon; Return of Property

- bond is forfeited by failure to enter appeal, 1 R 57
- by withdrawal before return day, 30 C 145
- or by failure to return writ, 36 C 143, 48 C 321
- whether caused by negligence of officer or plaintiff, 36 C 143
- bond of party alone is not sufficient, 1 R 168
- bond is security in lieu of property replevied, 1 R 261, 14 C 434
- surety not discharged if principal takes poor debtor's oath, 1 R 261
- judgment, if defendant prevail on avowry, should be for costs and damages, 4 D 141
- meaning of "shall prosecute to effect," 14 C 117
- judgment de retorno only enforceable after judgment in attachment suit, 14 C 432
- inoperative after death of debtor in attachment suit, 14 C 432
- action on bond; defense; prior attachment, 16 C 567

- failure to return; averment of avowry on writ de retorno is not required, 16 C 567
- defendant is entitled to return on withdrawal of suit, 16 C 578, 30 C 139
- also on abatement for irregularity, 17 C 233
- bond to return *held* different from bond to prosecute, 17 C 233
- avowry not required to judgment of return, if process is defective, 17 C 233
- rule of damages on failure to return, 18 C 555
- bond to prosecute to effect, before a particular court, *held* valid, 30 C 139
- prosecution not limited to court specified, 30 C 139
- no demand is required before suit on bond, 30 C 139
- in suit on bond defendant may show in mitigation of damages that goods belonged to plaintiff in replevin suit, when, 36 C 143
- plaintiff cannot complain if judgment for defendant does not include return, 44 C 175
- no recovery can be had on bond attached to writ void on its face, 44 C 371
- defendant may contradict recognizance bond, 44 C 466
- on judgment of return, return to officer from whom taken is sufficient, 46 C 445
- officer has no power to waive return, without express authority, 46 C 445
- prerequisites to writ, as affidavit, bond, etc., made for defendant's benefit, 48 C 321
- failure to comply with such prerequisites makes writ voidable only, 48 C 321
- obligor cannot escape on ground of irregularity in replevin proceedings, or for technical defects in bond, 48 C 321
- nonreturn of replevin writ is no defense to action on replevin bond, 48 C 321
- surety may show in mitigation that defendant has received no damage, or that property has been returned, 48 C 474
- plaintiff entitled to possession of property at time of trial, but not when suit was brought, 51 C 175
- a harmless error, if any, that court did not direct return of property, 51 C 175
- nonresident need not give ordinary bond under statute in replevin suits, 54 C 48
- special bond under statute in replevin covers special costs, 54 C 48
- statute de bond in replevin suits, 54 C 48, 313, 57 C 192
- action on bond; where breach is admitted the defendant may prove that the damages suffered are less than the value of the property, 59 C 493
- replevin by C of property attached in a suit of A v. B; *held*, in suit by officer on bond, not necessary to make demand on B for amount of judgment, 61 C 271
- or to make search for property on which to levy, 61 C 271
- and where surety alleged collusion between A and C to compel him to pay bond, *held*, to constitute fraud, A must have believed C to be the rightful owner, 61 C 271
- the nonreturn of property within a reasonable time constitutes breach of bond, 61 C 271
- plaintiff not bound to accept tender of property after breach of bond and after suit brought on it, 61 C 271
- fact that plaintiff has filed judgment lien on real estate of defendant in original suit does not affect liability of surety on replevin bond, 61 C 271
- in a suit on bond surety cannot show depreciation caused by wrongful acts of party replevying, 61 C 271
- damages to be assessed upon the value at the time property was replevied, 61 C 271
- statute de nonsuit for failure to give new bond in replevin, 63 C 569
- represents property; estoppel of obligee; he cannot attack judgment in replevin fixing costs, 64 C 74
- nature of judgment for return; rendered on withdrawal of action, 70 C 605
- surety may show title in principal to mitigate, 70 C 605
- defendant can recover his damages, though judgment on general issue was given for one dollar damages; damages recoverable, 71 C 86
- though he claimed no damages in replevin action, 74 C 392, 553
- effect of judgment in replevin, where main issue was as to whether one was member of partnership, in subsequent action on replevin bond, 71 C 698
- B attached C's interest in partnership; A brought replevin against B and lost; in B's action on bond for nonreturn of goods, evidence as to C's interest in partnership, admissible in mitigation of damages, 71 C 698
- where replevin is brought for wrongful attachment of liquor license, person directing attachment is real party in interest and may sue on bond; damages, 74 C 392
- damages recoverable; loss of use of lunch-wagon, 74 C 551
- effect of bond when given by receiver, 75 C 633
- obligee in bond can sue on bond and in replevin for nonreturn of goods; action for nonreturn sustained, though goods were afterwards returned, 76 C 683
- plaintiff, sued on bond, cannot defend on ground that it was not taken by officer signing writ; where officer who signs writ becomes surety in recognizance, this defect cannot be ground of defense for him; signature of de facto justice, 77 C 183

§ 4 Replevin

bond of B, "as attorney for" R, binds B personally, 78 C 227
damages recoverable for detention of a motor truck wrongfully replevied, 94 C 481
only nominal damages are recoverable in action on bond where only items claimed were in preparation of case and no evidence given as to them, 96 C 683
—where goods taken pending replevin action by true owner, 96 C 684
counterclaim as to defendant's damages, 101 C 60
verdict for defendant for \$1 on counterclaim makes question of damage *res adjudicata*, 101 C 416
—may be pleaded in bar to subsequent action by defendant on replevin bond, 101 C 416
owner entitled to damages for loss of use of automobile wrongfully replevied; how proved, 108 C 524
plaintiff must redeliver articles taken under writ which belong to defendant within a reasonable time, 112 C 115
—notice that they are held for defendant will not prevent judgment for return, 112 C 119
punitive damages not allowable in absence of fraud, malice, gross negligence or oppression, 112 C 115
whether fact that surety on replevin bond did not actually subscribe it would have effect of discharging principal, *quaere*, 119 C 460
plaintiff cannot rely on defect in bond which he himself gave to enable him to institute suit, 123 C 381
where, on request of plaintiff in replevin, defendant surety company issued bond inappropriate to action which was accepted by defendant without examination, bond could not be reformed to make it accord with that required by statute, 125 C 440

§ 5. Pleading and Practice

not essential to regularity of process to set out in full the bond required by statute, 9 C 144
plea of non cepit puts in issue taking by attachment or distress, 10 C 75
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RESIDENCE AND DOMICIL

See also DIVORCE § 2; JURISDICTION § 2; PAUPERS § 6

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SALES

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§ 1 Sales

18. —In General; What Constitutes
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26. SALES IN BULK

NOTE: Cases involving the sale of real estate are listed under VENDOR AND PURCHASER.

See also AGENCY; AUTOMOBILE § 2; BONA FIDE PURCHASERS; BROKERS;
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§ 2 Sales

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—plaintiff *held* to have failed to prove such acceptance before receipt of letter canceling order, 114 C 12

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courts will not grant relief if proof of illegal contract is necessary to support action or purpose of contract to violate law, 126 C 503

—while illegal practices in violation of liquor law might subject plaintiff to penalty they were no defense to suit for goods sold and delivered, 126 C 503

under regulations and statute, contract for sale of liquor brought about by illegal inducement from vendor is void and no action can be brought to enforce it, 128 C 436

§ 3. Distinguished from Other Transactions

transaction *held* not to be a mortgage but a sale with option to repurchase, 51 C 544

instrument *held* a bill of sale rather than a contract to pay money, 54 C 526

contract for lease of mill and sale of grain furnished by lessor *held* to be contract of bailment, not sale, 70 C 738, 71 C 164

delivery on thirty days' trial, then, if not rejected, to be paid for, constitutes bailment with option to buy, 75 C 469

though bill of sale given under circumstances which might cause equity to regard it as a mortgage, not such within penal statutes; effect of recording, 79 C 338

where a sale is alleged and admitted, it is error to hold transaction a loan, 85 C 215
 bill of sale *held* not a chattel mortgage, 89 C 176

agreement for "purchase" of instalment contract with provision for repurchase is a pledge, not a sale, 93 C 129

contract to sell goods to be manufactured is a contract of sale, 98 C 560

transaction between broker and customer found to be a direct sale by former to latter, 99 C 515

—and not an order to broker to buy the stock in the market, 99 C 515

consignment of goods by plaintiff to S Company under agreement that none be sold without plaintiff's consent, *held* not to be absolute sale but title to remain in plaintiff, 102 C 38

—unauthorized sale did not vest title in S Company, 102 C 38

—buyer, president of S Company, *held* not to be innocent purchaser for value and not

§ 3 Sales

- protected by payment of price to assignee of S Company, 102 C 38
- Massachusetts Sales Act *held* not applicable, 102 C 38
- contract to sell and transfer stock with agreement of repurchase in event of death or on notice, is sale, not gift, 106 C 412
- secret intent of parties disregarded, 106 C 412
- where automobiles were sent to subsidiary corporation and treated in all respects as sold to it except that word “consigned” was written on bills after attachment was threatened, they were treated as sold, 112 C 374
- M Bank, in financial difficulties, entered into agreement with C Bank transferring to it all assets, C Bank assuming all liabilities; *held*
- from provisions of vote, agreement of transfer and practical construction gist of transaction was absolute sale, not transfer for purpose of liquidation for benefit of M Bank creditors, 116 C 617
- and sale outside scope of statutes de sale by corporation except banks of all assets, and not impliedly forbidden by them, 116 C 617
- creditor of M Bank cannot compel receiver of C Bank to segregate transferred assets for former’s creditors, 116 C 617
- decision that return of liquor products was return of goods for credit rather than a sale of them at retail prices, made upon conflicting evidence, upheld, 126 C 503

§ 4. Construction of the Contract

- sale of goods “if he would pay,” a sale on condition precedent, 20 C 375
- sale of all furniture in hotel “used in business of innkeeping”; piano kept for use of guests *held* included, 49 C 490
- order for parts of dozens of hats of different sizes for convenience; *held* not intended to make entire contract as to each class, 53 C 221
- notice on billhead that all claims must be made within three days after delivery; *held* not to affect vendee’s contract, 53 C 221
- goods ordered for “spring shipment”; evidence as to technical meaning; cannot extend beyond July 1st, 69 C 544
- delivery “over the rail of a vessel” means one sent on reasonable notice, 69 C 551
- until delivery, title and risk of loss are vendor’s, 69 C 551
- where contract is silent as to time of delivery, reasonable time is implied, 73 C 660, 81 C 572
- sale without agreement as to price implies reasonable price, 78 C 477
- reasonable time is for the jury, 81 C 343, 92 C 44

- proof of a contract to deliver lumber within a reasonable time does not support a contract to deliver on arrival, 81 C 572
- parol proof admitted to construe technical words, 81 C 572
- reasonable time is a question of fact; if one answer only possible, it is a question of law, 81 C 572
- delay of railroad company can be considered on reasonableness of delivery, 81 C 572
- meaning of “transit car” in sales slips of lumber, 81 C 576
- evidence admitted to show what “net to us” means, 83 C 65
- interpretation of contract of sale as to agreement to pay taxes, 84 C 177
- agreement to sell and deliver automobile in good and running condition construed, 84 C 463
- jury determines disputed terms of oral agreement, and whether it has been repudiated, 90 C 286
- what is meant by an agreement to put a car in first-class running order, *quaere*, 91 C 185
- parties *held* to have contemplated payment in full before salability of goods could be determined, 93 C 103
- custom of trade as to mode of payment forms part of contract of sale, 93 C 211
- if goods described by trade name, seller must furnish goods of that description, 93 C 684
- parties may treat contract as severable even though it would not ordinarily be deemed so, 93 C 688
- where specific articles are mentioned in a sale, it is construed not to mean other articles of a different character, 94 C 491
- provision giving seller right to require payments to be made in advance before delivery of instalments, if in its judgment buyer’s credit became impaired, construed, 97 C 116
- would not permit seller to require full payment for all past deliveries before making any further ones, 97 C 116
- would require fair exercise of judgment, 97 C 118
- delivery to be at certain time or as soon thereafter as possible, construed, 98 C 431
- an offer to sell for “\$1600 or \$1700” construed as offer to sell at lower figure, 99 C 145
- sale of “our entire collection for 1920” of waste, delivery “as collected,” is an entire and indivisible contract, 99 C 301
- construction of contract, including question of implying condition as to impossibility of performance, is for court even though dependent on surrounding circumstances, 100 C 581
- proper course for court to take in jury trial, 100 C 581
- court will not imply condition as to contingency covered by contract, as one which

would require speedier delivery where delivery is agreed to be made when an embargo is lifted, though it continued much longer than expected, 100 C 581

—no frustration of contract in such case though no market for goods when delivered, 100 C 581

contract for sale of six cars of coal, *held not* to require single delivery, 106 C 372

bill of sale of interest in grocery business *held* to include leases owned by parties, 112 C 364

provision that shipment is subject to conditions beyond seller's control includes unusual conditions of voyage due to stormy weather, 114 C 492

contract to sell "such quantity of ice as the city owns or shall harvest" did not by implication bind city to harvest any ice and where none was harvested did not obligate city to furnish any, 121 C 408

agreement that sum be withheld from purchase price of house, deposited with attorney and paid over to vendor of oil burner when defects therein were remedied to satisfaction of buyer of house, 125 C 452

sale of partnership assets by surviving partner; good will included though partner established similar business nearby, 127 C 704

deed conveying real estate and tangible personal property but not mentioning good will; such an instrument does not necessarily state agreement of sale on which it is based, 127 C 704

§ 5. Performance and Breach

§ 6. —In General

sale of goods to be paid for on the happening of a certain event; vendor's recovery is not defeated because the event becomes impossible by accident, 51 C 500

—same rule de ascertainment of quantity in a particular manner, 51 C 503

sale of cow with calf at fixed price but less price if not with calf; *held*, on facts that vendor could recover larger price, where cow eventually proved with calf, though a settlement had already been made at lesser price, 53 C 72

sale of piano on instalment plan; an allowance of \$300 not to be considered as payment of the first ten instalments, 86 C 1

destruction of property purchased on the instalment plan, where vendor retains title until payment in full, does not relieve vendee from payment, 89 C 232

overcharge for goods has nothing to do with whether they were made in accordance with the contract, 89 C 254

overcharge for one item may be balanced with undercharge for another, 89 C 254

repudiation of contract as anticipatory breach, 90 C 286

in agreement of sale attempting to restrain competition, *held* that plaintiff was under no obligation to prevent D from opening a restaurant, 90 C 625

absolute and unconditional contract to sell milk not excused by a quarantine, 92 C 392

presentation of draft not necessary to render vendee liable, but he must have notice of arrival of bill of lading, draft, and goods, 93 C 211

allegations of sale; its terms, delivery, notice; refusal to pay is a cause of action based on executed sale without showing acceptance, 93 C 212, 219

anticipatory breach only occurs when other party acquiesces, 94 C 88

fulfillment of obligation to deliver goods "guaranteed same formula as lot previously sold," 94 C 161

seeds ordered but some of the order left out by mistake and sent later; *held* to be included in the original contract, 94 C 443

bank, that discounts drafts with bill of lading annexed, is not answerable to buyer for performance of seller's contract; money cannot be returned, 95 C 300

election of seller to treat buyer's repudiation as an anticipatory breach, 98 C 414

appointment of receiver operates as a breach from date of his appointment, 98 C 414

—unless he adopts and carries out the executory contract, 98 C 423

—entitles other party to present claim for damages in receivership proceedings, 98 C 414

—this rule applicable to all receiverships, voluntary or involuntary, 98 C 414

contracts for merchandise, open and executory at receiver's appointment; seller not required to offer delivery thereafter either to buyer or its receiver, 98 C 428

—receiver not a party to contracts unless and until he elects to adopt them, 98 C 428

—if he does so elect, he is bound to make the first move and notify the seller, 98 C 428

brass fuses alleged by plaintiff not to conform to contract; counterclaim by defendant for plaintiff's refusal to accept; action of trial court in setting aside plaintiff's verdict *held* erroneous, 98 C 501

provision in contract to purchase sugar for credit to be established by buyer mere auxiliary term for seller's benefit, 98 C 666

—failure to establish it, especially if not an equivocal refusal, is not waived though seller took no notice of it for three or four months, 98 C 666

where sugar contract provides that buyer furnish choice of grades and containers, he is bound to do so, and failure constitutes breach, 102 C 194

§ 6 Sales

effect of provision permitting seller to ship grades available if assortment list which should be sent by buyer is not furnished, 102 C 194

—one permitting seller to substitute other goods if he finds it necessary, 102 C 194

where single contract of sale is made of goods to be delivered in instalments, that seller himself bought goods in two lots does not sever contract, 103 C 172

delayed payment of lesser amount than claimed by seller was adequate performance of buyer's promise to pay "on presentation of invoice," where invoice presented was incorrect, 107 C 41

where shipments were to be made by vendor as specified by vendee it was duty of latter to direct shipments within reasonable time, 116 C 582

letters stating that corporate existence of vendee was being terminated, etc., *held* not renunciation of obligation to give orders for shipping materials contracted for, 116 C 582

—and clause as to uncertainty of time of payment not repudiation of obligation to pay within thirty days, 116 C 582

—inference of ultimate breach could not be drawn, 116 C 582

—no right in vendor to rescind and sue for damages or to treat contract as still existing, tender performance and sue for purchase price, 116 C 582

§ 7. —Delivery

See also § 9, *infra*

is of the essence of a sale, 5 C 199

delivery of bill of lading *held* a good delivery of goods at sea, 6 C 284, 57 C 383 must be evidenced by some act or expression indicating an intent, 7 C 500

—bill of sale kept by third person subject to depositor's order is not, 7 C 500

a written instrument takes effect only by and from delivery, 7 C 502

no formal delivery required on sale to one holding as bailee, 30 C 201

what delivery is sufficient between company and directors who are creditors, 47 C 47

—where directors are mortgagees of building in which goods are, 47 C 47

delivery of certificate of stock is good as a symbolical delivery of the stock, 50 C 472 of standing trees, *held* to become complete when cut and piled, 51 C 500

delivery of personal property under contract that vendee shall not own it until paid for, is conditional, 56 C 70

—does not vest title in vendee, 56 C 70

delivery to third party "on account" of vendor is not a delivery to vendee, 56 C 70

—immaterial that goods were charged as if sold on that day, 56 C 70

of bill of lading *held* a symbolical delivery of the property, 57 C 383

defendant sold ice in his icehouse and before delivery covered it with new ice and on demand asserted title; *held* no defense to suit for conversion that delivery was impossible, 61 C 166

—if party has a lien, or is not able to deliver, he must put his refusal on that ground, 61 C 166

the fact that vendor has voluntarily put delivery out of his power is no defense for refusing to deliver, 61 C 172

what is reasonable time for delivery is a question of fact for jury, 73 C 660, 81 C 573

—where but one conclusion reasonably possible, court may itself declare it, 81 C 573

custom and usage of trade assumed to have entered into the sale; not to make second shipment till first paid for, 82 C 116

delivery defined, 86 C 22

failure to accept instalment sufficient to justify vendor in failing to make further deliveries, 88 C 22

under continuing contract for manufacturing of goods, vendor is not obliged to continue to deliver when vendee refuses to pay for goods already delivered, 89 C 255

agreement to deliver goods on demand does not mean to carry them to the other party, 89 C 255

—it means simply granting permission to the other to come and get them, 89 C 255

constructive delivery and acceptance possible but proof must be clear, 90 C 343

vendor need not make actual tender to vendee who has definitely stated he will not receive goods, 90 C 481

readiness and willingness to tender goods is sufficient, 90 C 481

law implies vendor will deliver goods within a reasonable time in the absence of agreement; if not, there may be rescission, 92 C 43

payment of purchase price as a condition precedent to consummation of sale by delivery can be waived, 92 C 186

delivery of personal property by owner to one who buys from first vendee is performance of original contract, if so intended, 92 C 186

meaning of expression "to be taken from car"; parol evidence to show meaning admissible, 92 C 636

arrival of carloads of potatoes at place agreed upon with notice of their arrival is delivery, and buyer must pay, 93 C 211

allegations of delivery and forwarding of bills of lading state a cause of action for the price, 93 C 212

agreement to ship by transit car with inspection on car calls for delivery at buyer's location, 94 C 1

six weeks *held* to be a reasonable time for delivery, 94 C 1

delivery is made if goods are presented as ordered but refused, 94 C 80

delivery to carrier pursuant to terms of the contract is delivery to the buyer, 94 C 80

wrongful refusal by vendee to pay for first carload excuses seller from tendering or delivering second, 95 C 529

if contract is silent, law implies that delivery is to be made in a reasonable time, and that payment is then to be made, 96 C 88

where contract provides for credit for deliveries, failure to pay for one no ground for refusal of further deliveries, 97 C 116

—delivery and payment are not concurrent conditions, 97 C 116

where contract provided for delivery of goods as buyer might direct, it was the duty of the seller to use reasonable diligence to put them in a deliverable condition, 97 C 292

after receiver's appointment, seller not required to offer delivery, 98 C 428

whether shipment "prompt" or "rush" as required by contract; effect of railroad embargoes and scarcity of cars, 102 C 626

when buyer requests postponement of delivery of certain instalments, seller may assume postponement relates to all subsequent deliveries, 103 C 172

delivery to buyer's customers upon his instructions is delivery to him; and his lack of opportunity to inspect is of no significance, 104 C 674

purchase of stock to be delivered to bank sight draft attached *held* breached by seller delivering it without draft, 111 C 709

—purchaser deprived of notice and opportunity to pay, 111 C 709

—no duty on purchaser to have money on hand at bank, 111 C 709

—nor to prove that he was ready, able and willing to pay, 111 C 713

sale of coke to be shipped from boat due about February 20th and subject to conditions beyond control of seller, justifies delivery on March 7th where vessel delayed by stormy weather, 114 C 492

—shipment "about February 20th" is met if boat arrives within reasonable time after that date in view of all circumstances, 114 C 492

—provision that shipment is subject to conditions beyond seller's control includes unusual conditions of voyage due to stormy weather, 114 C 492

where shipments were to be made by vendor as specified by vendee it was duty of latter to direct shipments within reasonable time, 116 C 585

§ 8. —Acceptance; Inspection

vendee may refuse to accept goods when deficiency is material, 14 C 518

loose expressions in letter *held* no justification for refusal to accept, 29 C 62

vendee not bound to accept part only of goods ordered, 29 C 409

—acceptance of part *held* a waiver of objection as to the part accepted, 29 C 409, 53 C 234

—law implies promise to pay for the part accepted, 29 C 409

—duty of vendee, where part of goods only are sent, 29 C 409

effect of unauthorized transfer by buyer to third person, 29 C 414

purchase by agent; refusal of principal to accept; neglect to give notice to vendor *held* equivalent to acceptance, 39 C 31

acceptance sufficient to pass title between vendor and vendee may be made without actual receipt of goods by vendee, 60 C 366

acceptance of goods may be found from acts, without words, or intent to accept, 66 C 68

guaranty of successful operation not condition precedent to acceptance, 66 C 68

retention without test or complaint as justifying finding of acceptance, 66 C 93

where validity of oral agreement for sale of goods depends on acceptance and receipt by purchaser, charge should distinguish between language and conduct of parties in making contract and language and conduct evidencing acceptance and receipt in fulfillment of contract, 75 C 375

sale at agreed price on thirty days' trial; facts *held* to waive provisions as to approval or rejection; subsequent promise to pay means agreed price, 75 C 467

acceptance as waiving defects, conditions, etc., 77 C 125

in contract to sell "suitable" goods, buyer is not the sole judge; is question of fact for the jury, 82 C 220

acceptance defined, 86 C 22

further inspection waived if one, after examining a part of goods, agrees to buy just as they are, 86 C 23

buyer can inspect goods before paying for them; for manufactured goods, this is done at the factory, 89 C 254

false statement that a sample had been sent to the head of the department permits nonacceptance of goods even after they had been held three months before inspection, 90 C 192

receipt of personal property implies delivery; constructive delivery and acceptance possible but proof must be clear, 90 C 343

vendee must examine and accept articles within a reasonable time, 91 C 71

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—if he continues to use them after a reasonable time, he is presumed to have accepted them, 91 C 71
reasonableness of time to inspect article is for the jury, 91 C 185
payment of part of the purchase price is not evidence of acceptance by the buyer, 91 C 185
keeping automobile, without returning it or notifying vendor that it is unsatisfactory constitutes acceptance, 91 C 731
custom of trade is that one has right to inspect goods ordered by telegraph, 93 C 218
acceptance need not be proved in action for purchase price where delivery is proved and no objection was made to the goods, 93 C 219
vendee's accepting one instalment of goods does not preclude him from refusing others which do not conform to the contract, 93 C 671
retention of possession by vendee without objection to quality of goods is basis for finding that they were accepted, 93 C 671
there can be an action for the price where goods are delivered to carrier though purchaser refuses to accept them, 94 C 86
buyer has reasonable time to examine goods to see if they conform to contract; he must either accept or reject them within that time, 97 C 207
—he cannot qualify his rejection and retain goods; if he does he is deemed to have accepted them, 97 C 207
—if after time to reject has expired, seller extends time, buyer must act in accordance with directions given by him, 97 C 207
where goods are shipped in instalments, any instalment not corresponding to order may be rejected, 97 C 485
—but if vendee waives any defect and accepts, he does so as a part fulfillment of order, 97 C 485
goods are accepted in law where they are of proper quality, buyer takes them into possession, but on examination, reships them to seller as unsatisfactory, 97 C 673
absolute refusal of buyer to accept merchandise ordered, even if shipped, constitutes an immediate breach and gives rise to present cause of action, 98 C 414
—under such circumstances seller not bound to tender delivery prior to suit, 98 C 414
—breach not cured by effort of seller to induce buyer to accept the goods, 98 C 414
not a sale by sample unless manifest intent that bulk should correspond with sample; no such sale where seller expressly refuses to sell by sample, 99 C 296
agreement for reinspection of certain goods already delivered *held* not to affect rights as to future delivery, 102 C 530

—if there had been a breach by failure to deliver goods of proper quality before reinspection, later deliveries could be refused, 102 C 530
parties have right to stipulate that all objections must be made within a certain time, 104 C 674
buyer liable for full purchase price where acceptance of goods not conforming to contract after reasonable opportunity for examination; may counterclaim for damage due to breach of contract, 104 C 674
purchase on trial; trial must begin within reasonable period; election must be made within reasonable time of completion of trial, 111 C 558
acceptance of waterproofing material inferred from its use and failure to claim unsatisfactory for year, 111 C 564
where goods have been accepted and no notice of rejection given, fact that they were worthless is no defense in action for price, 112 C 181
—retention without notice of rejection for long time as acceptance in law, 112 C 181
—nature of notice of breach of contract required to give action after acceptance of goods, 112 C 181
acceptance of goods with knowledge that they do not in all respects correspond to contract not itself basis of waiver, 112 C 385
—by giving proper notice to seller, buyer can still recover for defective performance, 112 C 385

§ 9. Passing of Title; Risk of Loss

mode of delivery *held* to charge vendee with risk during transit, 1 C 60
if goods are not shipped as ordered, to care of third person, title does not pass unless condition is waived, 15 C 335
—truckman or carrier is not a general agent and has no power to waive condition in contract for vendee, 15 C 335
sale by one without authority transfers no title, 16 C 144
—so in sale on execution of goods exempt, or belonging to stranger, 16 C 144
the bargain passes property in chattel, without delivery; the title thus passed, binds all claiming under vendor, unless impeached on other grounds, 16 C 361
no separation needed to pass title to part of mass of same quality and value, 39 C 413
—aliter, if mass be composed of articles of different quality and value, 39 C 413
—whether vendor and vendee hold title in severalty, *quaere*, 39 C 413
—vendee can sue in trover for his part, 39 C 413
—whether title passes in such case depends on intent of parties, 39 C 413

bill of sale is not required to pass title to ship, as between parties, 40 C 159

delivery is essential to pass title to nonexisting chattels, contracted for, 48 C 306

—though payment be made in advance, 48 C 306

sale of standing wood; part cut and removed; balance cut and destroyed by fire; vendee *held* liable for price, 51 C 500

—contract treated as a sale of wood standing, not as a sale of wood to be delivered at vendee's yard, 51 C 502

—contract *held* to give implied license to enter and sever wood from stump, 51 C 502

—this, when done, constituted complete delivery to purchaser, 51 C 502

—vendee had reasonable time to cut, pile and draw off wood, 51 C 502

"sale or return" is a mere option to return whole or part; title passes on delivery, 52 C 205

order for goods; "what is used will account for and ship rest back to you"; title *held* to pass on delivery, 52 C 205

delivery of personal property under contract that vendee shall not own it until paid for, is conditional, 56 C 70

—does not vest title in vendee, 56 C 70

acceptance sufficient to pass title between vendor and vendee may be made without actual receipt of goods by vendee, 60 C 366

provision for future delivery; title does not pass until delivery, or until condition is fulfilled, 62 C 58

guarantee of successful operation of article does not prevent title passing, 66 C 67

goods to be delivered "over rail of a vessel" means one sent on reasonable request; property remains in vendor of goods till delivery, 69 C 546

where goods which are to be delivered to vessel to be sent by vendee are lost, vendor cannot recover for them, 69 C 551

delivery of goods on part payment of price, with option to return, *held* to pass title, 74 C 675

if goods are not segregated or marked for buyer, title does not pass, in absence of agreement, 85 C 145

—but when delivered to carrier for buyer and he is notified, title passes, 85 C 146

sale with delivery passes title whether the goods are paid for or not, 86 C 373

delivery to common carrier designated by vendee vests title in him, 86 C 494, 88 C 23, 94 C 80

refusal of vendee to receive goods from carrier at their destination does not revest title in vendor, 86 C 494

vendee agrees to buy goods to be manufactured from time to time; after manufacture but before shipment vendee repudiates con-

tract; vendor does not accept repudiation; *held* title had vested in vendee, 86 C 494

where A agrees to take dress patterns from time to time, receiving credit for those he returns, and after first instalment is manufactured, but before shipment, repudiates the contract, and B continues to send patterns under the contract, title to goods passes to A although B could have refused to proceed with the contract if he so wished, 88 C 23

provision for shipping goods in future "as directed" will prevent title passing, 88 C 130

bill of lading with sight drafts drawn to seller, indorsed by him and forwarded to his agent, does not place risk of loss in transportation on him, 92 C 420

where there is a present sale or an unconditional contract to sell specific goods in deliverable condition at agreed price, title passes at once; risk of loss in transportation is on buyer, 92 C 420

—bill of lading to seller's order reserves to him *jus disponendi*, 92 C 420

delivery to carrier is delivery to buyer under statute, but buyer cannot have possession until price is paid, 92 C 420

f.o.b. indicates buyer is to pay freight from place named, 92 C 420

letter explaining delay in unloading potatoes *held* sufficient evidence to show defendant had knowledge of draft and bill of lading, 93 C 212

arrival of carload of potatoes ready for unloading is a delivery and completes vendor's obligation, 93 C 212

—title passes to vendee subject to right of inspection although actual possession is reserved until payment, 93 C 212

carload of goods is delivered when car is placed on switch, 93 C 212

—risk then passes to buyer though vendor takes bill of lading to himself and indorses it to be delivered to buyer when draft is paid, 93 C 212

no property passes until the goods are ascertained, 94 C 446

general verdict for plaintiff imported that goods were all right and hence title passed to defendant on their first receipt and remained there, 97 C 665

wrongful return of goods by buyer does not revest title in seller, 97 C 671

title passes by agreement to sell followed by delivery of possession, 101 C 456

where farm is sold with livestock on it, bill of sale of latter convenient evidence of title, 101 C 456

—but title passes on possession being taken of farm, 101 C 456

execution and delivery of bill do not transfer title unless so intended, 101 C 514

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—whether they are *prima facie* proof of transfer, *quaere*, 101 C 514

delivery of possession not necessary as between the parties, 101 C 516

loss in case of destruction of goods by fire falls on one having title even though he may not yet have possession, 101 C 577

sale of coal en route from mines; diversion orders to carrier *held* to constitute appropriation to the contract and pass title to buyer, 106 C 372

retention by vendee as passing title where article is purchased on trial, 111 C 562

burden of loss for burning of building on land under contract of sale before time for performance, 120 C 390

in absence of special agreement to contrary, check is not payment and debt for which it is given is not discharged until check is paid, 129 C 655

when buyer makes purchase for cash but gives check for purchase price, check constitutes merely conditional payment which becomes absolute only when it is honored; until then title does not pass to purchaser, 129 C 655

—rule one of “practical necessity” rather than of logic, 129 C 658

when buyer left checks signed in blank with seller and latter sold and delivered alcohol and filled in checks for purchase price but they were later dishonored, title did not pass and attachment of goods as buyer’s invalid, 129 C 655

—rights of seller not subordinate to those of State on tax warrant, 129 C 655

§ 10. Remedies of Buyer Generally

See also §§ 14, 15, 16, *infra*

remedies of purchaser against seller, 14 C 420

vendor of note is liable to vendee for price, if signature is forged, 26 C 23

if property does not answer terms of contract, there being no fraud, only remedy is for breach, 44 C 133

—vendee has no right to rescind unless the contract so provides, 44 C 133

sale and delivery; one month afterwards vendee discovered goods were not as ordered; *held* he could return within a reasonable time, 53 C 221

—so *held* where defect was in sizes of hats, 53 C 221

—and where order was for parts of a dozen in each class, *held* he need not return entire quantity of class where only part was defective, 53 C 221

—what is reasonable time is a question of fact, 53 C 221

buyer cannot refuse article bought as specific, existing chattel, though not answering purpose intended, 66 C 68, 73 C 556

damages for failure to deliver goods as ordered, 67 C 473, 74 C 541, 78 C 9, 79 C 104, 85 C 613

in absence of special agreement, executed contract of sale cannot be rescinded and property returned by vendee upon the ground of mere breach of warranty, 73 C 554

where goods ordered in another State do not conform to our law as to markings, if sale is made there, they cannot be returned on that account, 81 C 111

—but if they are so marked without authority in the order as to be unsalable here, they may be returned in reasonable time, 81 C 111

cannot recoup damages not claimed in pleading, 81 C 479

if plaintiff vendor did full duty under contract of sale, counterclaim need not be considered, 84 C 463

damages in suit by vendee for refusal of vendor to deliver goods is the loss directly and naturally resulting to vendee in ordinary course, 85 C 613

where there is an available market, the damages, in absence of special circumstances, is difference between contract and market price, 85 C 613

—if there is no market or if there are special circumstances, a different measure is applied, 85 C 613

sale of automobile and payment of draft; purchaser can recover money back from bank if automobile does not conform to contract, 88 C 415

one prevented by bill of lading from inspecting article purchased until after he has paid draft, may recover purchase price paid, 88 C 415

to recover agreed price of machine, burden is on defendant to prove it defective and inefficient, 89 C 336

refusal of goods and return to seller due to delay in delivery; resale and recovery of balance of price from carrier; vendee can recover in *assumpsit*, 90 C 647

one who wrongfully refuses to take articles ordered can recover money paid only as it exceeds difference between contract price and a lower market price plus expenses, 91 C 26

under entire and indivisible contract of sale, vendee may return machinery if not satisfactory; cannot accept part and return rest, 91 C 71

payment in full to take advantage of discount does not deprive vendee of returning goods under an agreement if unsatisfactory, 93 C 103

acceptance of goods does not preclude returning same if unsalable and if returned within a reasonable time, as per agreement, 93 C 103

damages for nondelivery are determined as of the date of vendee's knowledge of the refusal, 93 C 123

where there is an express refusal to warrant seeds, there is an action for failure to send the variety ordered, 94 C 443

remedies of buyer where seller's title is defective, 94 C 589

failure of consideration in whole or part is a good defense, 95 C 248

loss of profits, to business, and in purchase of other goods are special damages to be pleaded, 97 C 447

—if no evidence offered to show impossibility of purchasing other goods at less than contract price, only nominal damages can be given, 97 C 447

contract to sell goods to be manufactured is a contract of sale, 98 C 560

—measure of damages for wrongful refusal to deliver is difference between contract price and market price when deliverable, 98 C 560

—evidence of what other manufacturers sold like goods is relevant and admissible, 98 C 560

remedies of defrauded buyer, 100 C 393

effect of acceptance and retention of late deliveries where seasonable complaint made, 102 C 529

if buyer accepts late or defective deliveries, his remedy is by counterclaim for damages in action for purchase price, or independent action, 104 C 674

failure to give notice to seller of objection to late or defective deliveries precludes recovery on counterclaim, 104 C 674

use of property temporarily after notice of intent to reject it, merely for purpose of mitigating damages, 106 C 95

purchaser of stock entitled to difference between purchase price and market price at time of failure to deliver, 111 C 709

damage must be proved with all certainty reasonably possible, but exactness is not required if not reasonably possible, 112 C 385

courses open to buyer where he has ordered goods of two descriptions and entire shipment is of one only, 112 C 385

—effect of accepting shipment, 112 C 385

damage for failure to deliver goods as ordered at wholesale, 112 C 385

—buyer not obligated actually to buy others, 112 C 395

—cannot ordinarily recover also profit he would have earned by resale, 112 C 394

where vendor fails to deliver articles for vendee's use in manufacturing articles for sale, loss of profits proper element of damages, 113 C 229

—if vendee has made outlays for materials, loss on them recoverable, 113 C 230

—also storage charges until they can be disposed of, 113 C 230

damages for failure to deliver goods, 114 C 190

—statutory rule of market value not applicable where there is no available market, 114 C 190

—as where plaintiff having gasoline station had exclusive sale of defendant's products and agreed to sell them alone and defendant refused to make further deliveries, 114 C 190

—in such case profits which might have been earned are proper measure, 114 C 190

plaintiff sold defendant coal which would not burn; rights of buyer as to coal he had used and that unused, 114 C 422

§ 11. Remedies of Seller Generally

See also § 9, *supra*, and § 15, *infra*

right of stoppage in transitu lost if vendor attaches goods as vendee's, 15 C 335

vendor may treat sale as void if goods are purchased with design not to pay for them, 16 C 71

—vendor may reclaim goods from attaching creditor, 16 C 71

difference between stoppage and rescission for fraud, 20 C 58

right of stoppage in transitu does not exist after vendee has actual possession, 20 C 58

stoppage in transitu not materially affected by vendor's ignorance of vendee's insolvency, 20 C 59

meaning of "insolvency," giving right of stoppage in transitu, 20 C 60

—must occur after sale, 20 C 63

right of stoppage in transitu not affected by acts of agent for an undisclosed principal, 22 C 473

right of stoppage in transitu continues until final delivery at ultimate destination, 22 C 473

contract for sale; right of resale without notice after reasonable time; what is reasonable time to compel vendor to keep goods, 33 C 553

—notice of readiness to deliver, and offer to deliver, is all that is required, 33 C 558

—no tender back of part of price is required, 33 C 559

—notice of time and place of resale required if vendor seeks to recover difference in price, 33 C 558

—part price paid is recoverable after resale, 33 C 559

price payable in instalments at different dates; vendor may sue for entire sum in one count, 54 C 84

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- and prove same by different notes, all of which have accrued and are unpaid, 54 C 84
- facts stated and *held* not to constitute a stoppage in transitu by the vendors, 54 C 415
- vendor's lien for purchase price *held* waived by contradictory claims, 74 C 541
- on failure to pay instalment, contract may be treated as broken and damages obtained, or as still in force and instalment may be sued for, 83 C 31
- judgment for first instalments of purchase price no bar to action to recover subsequent ones, 83 C 31
- in action for goods sold and delivered at agreed price, their reasonable value can be recovered, 83 C 65
- remedies in Sales Act for nonacceptance where title passed same as common law; where title has not passed, is new, 85 C 140
- plaintiff is justified in shipping goods after attempted cancellation and need not try to sell the goods when there is no market, 85 C 141
- elements of action to recover for nonacceptance when title has not passed are nonpassage of title at time of breach, inability to sell goods at a reasonable price, offer of vendor to deliver goods, buyer's refusal to receive them, notice by vendor that he will hold goods as bailee for buyer, 85 C 141
- where property has passed to the buyer, but goods remain in possession of seller as agent or bailee of buyer, they may be sold if buyer does not pay for them within a reasonable time, 86 C 22
- where one has brought suit to recover full purchase price of goods sold and delivered, and afterwards recovers part of the price by a resale, he can recover the difference in the same action, 86 C 22
- if vendor receives goods back, he cannot recover contract price unless he gives vendee notice that he holds them as vendee's agent, 86 C 494
- if goods remain in hands of carrier designated by vendee, vendee has sufficient notice of the fact that carrier holds them as his bailee, and vendor may recover contract price, 86 C 494
- measure of damages for vendee's nonacceptance of goods, 86 C 494
- right of action for vendee's breach of contract accrues at date of breach, 86 C 494
- in estimating damages for anticipatory breach, it cannot be assumed no goods would have been sold; must estimate as best court can, 86 C 494
- where goods are to be manufactured in lots, no recovery for those made after notice of repudiation, 86 C 494
- where vendee orders goods in stock and repudiates before shipment, and vendor proceeds to ship, recovery can be had for all shipped before vendee's breach, 88 C 23
- after attempted repudiation and failure of vendee to take goods from carrier, vendor can refuse further performance, 88 C 23
- vendor not bound to wait expiration of time within which goods are to be delivered where the vendee has repudiated the contract, 88 C 130, 90 C 286
- can elect to accept repudiation as anticipatory breach and can recover in damages what he would have made, 88 C 130, 90 C 286
- sale of goods by vendor to fix damages is an acceptance of vendee's repudiation, 88 C 131
- where contract provides that entire balance be due, if one instalment is unpaid, seller is not precluded from recovering purchase price in action at law, 89 C 336
- seller can sue for price even if title remains in him, if the property cannot readily be resold, 89 C 336
- damages for wrongful refusal to accept goods is difference between contract and market price, 90 C 481
- breach by vendee does not divest his interest; gives vendor right of forfeiture, 90 C 555
- in action for goods sold and delivered, even if no loss or profits, judgment may be for plaintiff, 92 C 230
- payment in full *held* not to deprive vendor of right to return unsalable goods where that was the agreement, 93 C 103
- damages for failure to accept goods sold, 93 C 689
- where property in the goods passes to the buyer, action can be maintained for the price, 94 C 80
- cancellation by vendee before shipment does not defeat action for price, 94 C 88
- where no warranty of seeds, seller may recover though he sends wrong variety of corn seed unless his conduct was negligent or fraudulent, 94 C 446
- whether on refusal to pay for certain instalments seller could treat whole contract as broken; how determined, 97 C 119
- resale by seller where buyer refuses goods and they are left in hands of carrier, 97 C 666
- notice to buyer that seller proposes to take goods as its agent, and resell, unreplyed to, shows buyer's acquiescence, 97 C 666
- when duty to resell arises, 97 C 666
- option of seller where goods of proper quality are shipped, taken by buyer, but, on examination, reshipped to seller as unsatisfactory, 97 C 674
- no present right of action arises from buyer's refusal, if goods are not yet deliverable, 98 C 414
- unless seller elects to treat buyer's repudiation as an anticipatory breach, 98 C 414

refusal of buyer to receive goods as excusing tender of delivery, 98 C 414, 106 C 372

interest recoverable as damages for unpaid price of merchandise sold, 98 C 689

—runs from time of sale or at least from delivery, 98 C 689

measure of damages for nonacceptance of goods contracted for, 98 C 689

provision in note given on sale of automobile for retaking possession if instalments not paid or car mistreated does not exclude ordinary action at law on breach of agreement, 98 C 736

upon repudiation by buyer, seller may tender complete delivery and bring action for non-acceptance, 103 C 172

—in such an action, issue is whether the performance actually tendered by seller was sufficient, not whether he was ready, able and willing to perform, 103 C 172

right of stoppage in transitu continues till final delivery, 104 C 342

notice of stoppage in transitu need not state basis of claim, since right only exists in case of insolvency, 104 C 342

notice of stoppage in transitu, though signed by third party, *held* sufficient to apprise freight agent of its source and authenticity, 104 C 342

where seller, named as consignor and consignee in nonnegotiable bill, indorses to order of buyer, bill does not become negotiable nor can seller's right of stoppage in transitu be defeated by transfer to bona fide purchaser, 104 C 479

right of stoppage in transitu only defeasible by transfer of negotiable bill or subsale with seller's assent, 104 C 479

sale of six cars of coal en route from mines; seller *held* entitled to recover purchase price of two cars delivered, upon buyer's repudiation, 106 C 372

after buyer's repudiation, seller may refrain from delivering balance of goods in order not to enhance damages, 106 C 372

after buyer's repudiation, seller may recover full purchase price of goods already delivered, 106 C 372

when seller who abandons contract may recover reasonable value of goods accepted by buyer, 108 C 186

if infant has disposed of property he need not account for proceeds if he pleads infancy to a suit for purchase price; otherwise if he has specific goods purchased in his possession and ownership, 108 C 528

measure of damages for breach of contract to buy automobile buses; alleged resale within reasonable time not established by the evidence, 108 C 605

damages for refusal to accept goods by buyer where goods are marketable, 108 C 632

—where they are to be manufactured and buyer repudiates contract, 108 C 632

—same rule applies where goods are to be sent on order and orders are not given within time set in contract, 108 C 632

—in such case lost profits recoverable, 108 C 632

notice sufficient to inform buyer that seller was holding car for him and acting as his agent, 112 C 646

—measure of damages is difference between contract price and price realized, 112 C 646

profits which seller would have received in ordinary course of events element in computation of damages where seller stops production of goods ordered on buyer's refusal to accept, 113 C 229

§ 12. Warranties

§ 13. —In General

vendor of a public security warrants its genuineness, 1 R 350

sale of good beef duly marked by inspector; vendor liable if not good, though duly inspected and marked, 2 R 408

—and though ignorant of the defect, 2 R 408

sale is at vendee's risk as to quality and condition, in absence of express warranty and fraud, 1 D 156, 4 C 428, 34 C 469, 41 C 41

—though article is worthless from latent defect, 1 D 167

—vendee cannot recover as for failure of consideration, 1 D 167, 34 C 469

sale of machine "such as I have patent for" is not a warranty of a valid patent right, 1 C 342

warranty is not implied from a sound price, 4 C 428

sale of horse "with all faults," is at vendee's risk, though vendor does not communicate known unsoundness, 9 C 107

—aliter, if vendor make misrepresentations, 9 C 107

legal effect of sale of chattel with warranty, and of land with covenants, is the same, 11 C 439

general warranty does not extend to visible defects, 24 C 562

—aliter, if defect is not discoverable by the eye, or if it require skill to detect, 24 C 562

—or if vendor uses art to conceal defect, 24 C 562

—so *held* as to blindness in horse, 24 C 573

representations of stranger to whom vendor refers, *held* binding on vendor though made in his absence, 24 C 572

permanent and visible lameness represented to be temporary; vendor *held* liable, 24 C 574

vendor of note is liable to vendee for price, if signature is forged, 26 C 23

§ 13 Sales

that cattle will "work evenly on yoke," is broken if they will not work with driver of ordinary skill, 28 C 329

in action for false warranty, partial failure of consideration is no defense when, 30 C 336
there is no implied warranty on sale of personalty on execution, 32 C 98

sale by sample implies a warranty of bulk to correspond, 32 C 148

—on refusal to accept, vendor assumes onus to prove such conformity, 32 C 147

warranty is implied from purchase for special purpose communicated to vendor, 34 C 67

rules in regard to notice to warrantor to defend title are not applicable to personal covenants, 34 C 185

—of clear record and title in mortgage; want of notice to defend, *held* no defense, 34 C 185

in absence of fraud, all previous representations are merged in written warranty, 43 C 252

newspaper advertisement of successful condition of railroad implies that road is on a paying basis, 45 C 325

—is not limited to date of advertisement, 45 C 325

allegation that defendant warranted horse "to be sound"; proof of warranty that horse "was all right except that he would sometimes shy"; for jury, whether warranty proved was in substance the one alleged, 49 C 462

—representation that horse would sometimes shy, *held* not, as a matter of law, a representation of partial blindness, 49 C 462

breach of warranty in sale of horse; evidence that plaintiff had tried to set aside other purchases *held* inadmissible, 53 C 564

—evidence to show that plaintiff was not an expert on diseases and vices of horses, inadmissible, 53 C 564

—or to show that plaintiff was given to imagining defects in horses, 53 C 564

in a suit for breach of warranty that horse was sound so far as vendor knew, vendee must prove former's knowledge of unsoundness, 56 C 229

an averment that machine was in good working order, means "good order" for vendee's use, 56 C 490

—averment that machine was wholly useless for the purpose *held* sufficient for recoupment on breach, 56 C 490

warranty of title is implied in sale of personal property, 62 C 160

parol warranty cannot be added to written contract of sale, 70 C 450

in case of sale by sample description or order, vendee may refuse goods not corresponding, 73 C 556

warranty is for the benefit of original purchaser, not for subsequent vendee, 83 C 231

a horse warranted sound is not unsound because unmanageable, while being shod, 83 C 666

to constitute unsoundness in horse at time of sale, he must have a disease or some alteration of structure which diminishes his usefulness, 83 C 666

breach of warranty, how pleaded, 83 C 670

warranty of automobile in good and running condition includes what, 84 C 463

where complaint alleges breach of implied warranty on a certain date, recovery cannot be had for breach on other dates, 85 C 448

food and drink provided by restaurant keeper do not come under our Sales Act as a warranty, 88 C 314

—if unwholesome, action of negligence only remedy, 88 C 314

origin of provision in Sales Act de implied warranty, 88 C 320

statement that bonds are safer than stocks is not fraudulent, and a warranty of their security means at the present time and not during the life of the bonds, 90 C 30

plaintiff must prove that automobile was not in running condition promised; need not show specific defects, 91 C 185

little difference between warranty to put in "first class running condition" and one to put in "running condition," 91 C 185

on question of making a warranty, knowledge of seller, as to worthlessness of article, need not be proved, 92 C 599

in action to pay cost plus a percentage, fact that article is worthless is no defense, 92 C 599

warranty of salability of goods continues for a reasonable time after goods paid for, 93 C 105

warranty of fitness for a special use; acceptance after inspection is not evidence of conformity to contract, 95 C 529

burden is on vendee who counterclaims for breach of warranty, 95 C 529

—failure of plaintiff to prove case does not entitle defendant to recover on counterclaim, 95 C 529

implied warranty of wholesomeness in sale of foods, 96 C 105

whether sale was by sample or not; conclusion of trial court when reviewable, 99 C 296

—conclusion of trial court that sale was by sample *held* erroneous, 99 C 296

—mere exhibition of sample not enough, if seller refuses to sell by sample, 99 C 296

—extent of correspondence between sample and bulk varies with character of goods, 99 C 296

—effect of timely offer to inspect goods as regards sale by sample, 99 C 296

- what is essential in order to effect a sale by sample, 99 C 301
- contract of sale once made cannot be changed to a sale by sample except by mutual agreement, 99 C 305
- evidence of usage or custom in trade not to sell by sample, *held* admissible, 99 C 306
- statute de sale by sample merely reaffirms common law, 99 C 301
- implied warranties in sale by sample apply where delivery is to be in instalments, at one time or at different times, 99 C 302
- allegations *held* to state a case either of fraud or breach of warranty, 100 C 393
- broker who is employed to sell certain merchandise not empowered to bind principal by express warranty; information imparted to him de purpose for which goods required does not raise implied warranty of fitness for such purpose, 101 C 265
- where one without authority sells as agent for another he is not bound by any warranty of worth of genuineness of article or of seller's title, 103 C 110
- may be liable for representing himself as having authority, 103 C 110
- where written order was not intended to embody entire agreement, oral warranty for fitness for use in certain location in factory *held* properly found, 110 C 49
- to constitute an estoppel to assert the warranty by representations as to condition of factory floor, buyer must have understood question directed to him to be intended to elicit material information to be relied upon, 110 C 49
- express or implied warranty may be waived by express agreement fairly made, 110 C 255
- provision in contract that article is accepted without any express or implied warranty unless written therein, 110 C 266
- where there has been express refusal to warrant, no warranty will be implied, 110 C 266
- oral statement as to year of model of used automobile, not relied on, is not a warranty, 111 C 297
- nor is reference to year of model in bill of sale which is merely descriptive, 111 C 297
- in action on breach of warranty in conditional bill of sale, nominal vendor may show that bill was executed fairly to accommodate the plaintiff, the buyer, to enable him to finance deal, 111 C 572
- this would not violate parol evidence rule, 111 C 572
- knowledge of manufacturer that caps for bottles were to be used to bottle ginger ale as giving rise to implied warranty of reasonable fitness, 112 C 181
- in each successive transfer of a car originally purchased conditionally, there was an implied warranty by each vendor that he had good title free of any charge or incumbrance, 113 C 542
- in sale of food for domestic consumption there is an implied warranty of wholesomeness and fitness, 115 C 249
- this includes absence of foreign substance as piece of tin used to close vent in canning, 115 C 249
- decedent injured by swallowing tin in can of corned beef sold by dealer; dealer liable on implied warranty, 115 C 249
- warranty of fitness of food for consumption applies to canned goods not open to immediate inspection of dealer, 115 C 249
- defendant *held* liable for defective can of corned beef put up under its trade-mark though actually packed by another, 115 C 249
- statute de implied warranty of fitness follows common law, 115 C 258
- where there is in fact a breach of warranty a defense of good faith is immaterial, 116 C 579
- duty owed by restaurant keeper to guest is to use due care to furnish wholesome food, not that of insurer upon theory that transaction is sale; no implied warranty of fitness, 117 C 128
- Merrill v. Hodsan, 88 C 314, sustained and New York and Massachusetts doctrine rejected, 117 C 129
- service is predominant feature of transaction, which is not sale within Sales Act, 117 C 131
- and considerations of public policy de protection of public do not require contrary rule, 117 C 128
- dissenting opinion favors protection of consumer by adoption of Massachusetts rule, 117 C 133
- conclusion of court that horse's death was caused by lead poison in feed sold his owner, sustained, 117 C 510
- and where use of feed began same day as delivered, continued next day, and day following horse died, *held* no such delay or opportunity for contamination as to make inapplicable principle of implied warranty of fitness, 117 C 510
- where oil burner sold defendant was a good one and its failure to function was due to faulty installation, no breach of warranty on which rescission of sale could be predicated, 121 C 231
- no warranty, express or implied, in sale of beer cooling unit, especially where contract so stated, 121 C 651
- as answer and counterclaim were based solely on breach of warranty and claim for rescission, court in error in rendering judgment

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ment for defendant on theory of partial failure of consideration, 121 C 651

when buyer expressly or by implication makes known to seller that food purchased is for domestic use and relies on seller to select it, there is implied warranty of wholesomeness, including freedom from foreign substances, 125 C 92

bulldozer found not in condition to perform work for which purchased, 125 C 699

effect of provision in Sales Act de implied warranty of merchantable quality is to place burden of warranty on seller for protection of anyone who buys, 127 C 44

plaintiff injured by explosion of bottle of ale sold her by defendant which manufactures ale but not bottles; where evidence eliminating other causes of explosion, inference that there was defect in bottle permissible, 127 C 44

—furnishing this defective bottle was breach of warranty; doctrine not confined to food, 127 C 44, 48

facts showed there was no contract to sell specified article under its trade name and that plaintiff relied on skill and judgment of defendant, 127 C 226

jury entitled to believe plaintiff rather than doctor and to find her illness resulted from eating macaroni rather than from sight of bugs in it afterwards, 127 C 227

—expert testimony not essential or conclusive, 127 C 227

where contract specified “there is no agreement, verbal or otherwise, which is not set down herein,” *held* statements in prospectus sent purchaser of heating equipment by seller were not part of contract as warranties, 128 C 100

§ 14. —Remedies for Breach; Notice

in action on warranty no offer to return need be shown, 14 C 411

—or notice to vendor, of defects, 14 C 411

remedies of purchaser where goods defective, 14 C 420

in action on warranty defendant’s scienter is immaterial, 20 C 271, 27 C 325

in action on warranty proof of fraud does not support declaration, 20 C 271

—expenses of suit are not recoverable, 20 C 279

for breach of warranty either tort or assumption will lie, 20 C 275, 22 C 19

pork in leaky barrels; custom to repack; damages; reduction, 28 C 343

—if the loss is from plaintiff’s negligence, no action lies, 28 C 343

vendee need not sue for breach, but may recoup in suit for price, 28 C 343

after acceptance, party cannot rescind and return goods, though warranty is broken, 37 C 130

rule of damages for breach of warranty is the difference between warranted and actual value, 37 C 130

sale with warranty as to quality and with right of return; vendee may return or sue on the warranty in case of breach, 56 C 489

—if vendor sues for price, vendee may recoup damages for breach of warranty, 56 C 489

refusal to accept where warranty is broken, 66 C 86

right to return goods for breach of warranty where sale is executed, 71 C 172, 73 C 554, 79 C 126

damages recoverable for breach of warranty; facts *held* to allege this, not fraud, 79 C 126

to recover on a warranty express or implied, there must be evidence of a contract, 83 C 231

special circumstances can show increase of damages for breach of warranty, 88 C 109

—loss of custom, falling off of trade must be alleged, 88 C 109

damages for breach of warranty, 93 C 701, 95 C 248

alternatives open to vendee on breach of warranty, 95 C 531

damages same for fraud as for breach of warranty, 100 C 732

where buyer retains property, damages for breach is difference between actual value and value if as warranted, 101 C 427

—this may be evidenced by cost of improvement, 101 C 427

—additional expense through loss of interest or otherwise, recoverable, 101 C 427

buyer privileged to repudiate after delivery of defective instalments, 102 C 529

acceptance and retention of defective deliveries does not deprive buyer of statutory remedies, if he makes seasonable complaint, 102 C 529

buyer must give notice of defects within reasonable time, if he accepts goods, in order to recover for breach of warranty, 104 C 674

—parties may fix time within which notice of defects shall be given; it is not then for trier to determine whether it is reasonable, 104 C 674

defense to breach of warranty on ground of false representation of facts by buyer rests on estoppel, 110 C 54

if, after acceptance, buyer fails to give notice within reasonable time, he cannot claim breach of warranty, 111 C 564

—where, four months after goods were delivered, buyer promised payment and only claimed breach of warranty a year after delivery, conclusion that there was acceptance and no reasonable notice of breach of warranty upheld, 111 C 564

- where quality could not only be determined by use such use would not defeat right to reject goods, 111 C 567
- nature of notice to be given after acceptance of goods to justify action on warranty, 112 C 181
- complaint of defects and statements as to losses because of them *held* not to constitute such notice as matter of law, 112 C 181
- where goods are sold under warranty of title and purchaser or subsequent vendee is sued, on notice to vendor and request to defend the latter becomes conclusively bound by judgment, 113 C 539
- duty of vendor in such case, 113 C 539
- in action against vendor on judgment against vendee, former cannot show that vendee had good title and could have made defense, 113 C 539
- that judgment against vendee was by consent does not matter, 113 C 539
- judgment not rendered void by fact that conditional bill of sale on which it was based was unacknowledged where vendee's attorney did not know this made it void, 113 C 539
- such defense would require special plea, 113 C 539
- recoupment for breach of warranty in diminution of purchase price is to be pleaded as a counterclaim, 114 C 422
- where part of coal delivered has been used, such breach not so pleaded no defense for price of that used, 114 C 422
- but under answer might be defense to price of that not used, 114 C 422
- damages for breach of warranty do not include death, 115 C 249
- special circumstances may permit special damages beyond difference in value of goods, 115 C 249
- incumbent on buyer who rescinds contract of sale for breach of warranty to establish that goods he offers to return are in substantially as good condition as at time of transfer to him, as required by statute, 116 C 579
- and where no finding or evidence that car which has been used six months was in substantially as good condition as when bought, judgment for defendant correct, 116 C 579
- whether inference from six months' user admissible, *quaere*, 116 C 582
- whether "condition" in statute can be construed as "value," *quaere*, 116 C 582
- cannot avail himself of breach of warranty in absence of allegation to that effect, 117 C 457
- as where only breach alleged was by D company but court found sale was made by W company an independent concern, 117 C 457
- where no finding that grader was not reasonably fit to do work for which it was rented (with option to purchase) or that breaking down was due to breach of warranty, defendant not entitled to expense of repairs, 117 C 687
- scale sold vendee was replevied by H but vendee won suit though scale not actually returned; *held* vendee failed to sustain burden of showing title in H superior to that of defendant vendor, 118 C 474
- purchaser from whom certain property has been replevied can bring action for breach of implied warranty of title without awaiting outcome of replevin action, 118 C 474
- but must prove, either by judgment in action or otherwise, title in person replevying it, 118 C 474
- remedy does not extend beyond purchaser and his privy, 125 C 92
- so where wife gave husband money to purchase liverwurst, son who was injured from glass in it did not have action against seller for breach of warranty, 125 C 92
- where printed portion of conditional sale stated that seller made no representation or warranty but property was described as in good running order, buyer entitled to defend on ground that it was not, 125 C 702
- whether notice of injury to plaintiff by breach of warranty in sale of food was given within reasonable time was question of fact; jury could find that three weeks was reasonable, 127 C 224
- breach of warranty adequate ground for rescission of contract of purchase and recovery of purchase price, 128 C 9

§ 15. Rescission

- sale with right of rescission in six months; vendor has no right to possession on death of vendee ten months after, without rescission, though vendee is insolvent, 5 C 197
- power of rescission implied in the case of executory contracts, 14 C 422
- difference between stoppage and rescission for fraud, 20 C 58
- after acceptance, party cannot rescind and return goods, though warranty is broken, 37 C 130
- vendee has no right to rescind unless contract so provides, 44 C 133
- vendor with right to rescind for fraud must do so without unreasonable delay, 46 C 393
- how such right is lost, 46 C 393
- damages on lawful rescission of a sale, 79 C 127
- abrogation, as well as making, of contract requires meeting of the minds, 81 C 479

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original contract *held* rescinded by refusal of vendee to take goods after car reached destination as they were not up to quality, 83 C 65

on facts *held* no mutual rescission of sale, 83 C 520

rescission must be specially pleaded, 86 C 22
repudiation of executory contract of sale, unless acquiesced in, is not a termination, 88 C 23

question for jury whether purchaser had repudiated contract under such circumstances as to justify defendant in rescinding it, 90 C 286

waiver of right to rescind sale is mixed question of law and fact, 90 C 624

—sale procured by fraud may be rescinded and consideration returned, or contract affirmed and damages recovered, 90 C 624

action of replevin is a rescission of the contract, 91 C 482

plaintiff having, by an action of replevin, rescinded sale, *held* not to confirm it by putting in claim in bankruptcy for balance of purchase price as debt, 91 C 482

although sale was under general contract, each shipment was by separate order; *held* that for the purpose of rescinding or affirming sale, each could be considered separately, 91 C 482

must prove how much of replevied flour is included in sale in order to recover on affirmation of contract by act of replevin, 91 C 483

law implies vendor will deliver goods within reasonable time and if he does not these may be a rescission, 92 C 43

vendor agreed to send advertising matter, etc.; none was sent before first note for article purchased became due and none of the articles were received; *held* delay in shipment was not so unreasonable as to permit cancelling or rescinding contract, 92 C 44

buyer need only give oral or written notice of intention to rescind, 97 C 675

effect of “rescinding” executory contract of sale after breach by buyer, 98 C 666

—contract not necessarily extinguished thereby, 98 C 666

—vendor’s intention the controlling factor in the situation, 98 C 666

—sugar contract; buyer’s failure to establish bank credit to meet future shipments, 98 C 666

buyer may not claim rescission of sale in absence of active effort to avail himself of remedies under statutes, 100 C 732

if seller accepts buyer’s offer to return goods buyer is entitled to recover money paid, 100 C 736

cannot rescind unless he acts promptly after discovery of fraud, 103 C 302

whether defrauded vendor under severable contract of sale partially performed, must retake all the goods, upon rescission, *quaere*, 103 C 413

in action for rescission, vendor’s knowledge of falsity of representations not essential, 104 C 73

contract to sell units of common and preferred stock, is not severable but entire; purchaser entitled to rescind if corporation has no power to issue common stock, 106 C 41

defective steering wheel not a failure of consideration justifying rescission, 110 C 255

representation as to selling price; guaranty to increase business; defendant *held* not entitled to rescission on ground of fraud, 112 C 504

where buyer returned automobile without paying price, and seller, after trying to get payment, notified him he would sell car and hold him for balance, *held* contract not rescinded, 112 C 646

—registration of car in seller’s name after return for restricted purpose, *held* not to rebut other facts, 112 C 650

incumbent on buyer who rescinds contract of sale for breach of warranty to establish that goods he offers to return are in substantially as good condition as at time of transfer to him, as required by statute, 116 C 579

—and where no finding or evidence that car which has been used six months was in substantially as good condition as when bought, judgment for defendant correct, 116 C 579

—whether inference from six months’ user admissible, *quaere*, 116 C 582

—whether “condition” in statute can be construed as “value,” *quaere*, 116 C 582

letters *held* not to amount to anticipatory breach giving seller right to rescind, 116 C 583

contract to sell burner to defendant “installed” was more than contract of sale; it carried with it implied obligation to use care and skill in installation, 121 C 231

—failure to perform this executory promise might constitute failure of consideration entitling defendant to rescind, but only if promise broken was vital to contract, 121 C 235

—in instant case defendant’s conduct in removing burner but retaining and using equipment installed with it to value of \$105 forfeited his right to rescission, 121 C 231

—since contract was entire, not divisible, defendant could not accept one part and reject rest, 121 C 236

—but defendant entitled to set off against balance of purchase price, damages from faulty installation, 121 C 231

defendant could not claim rescission because equipment sold her was defective, where she used part of it after plaintiff refused to accept return of articles, 121 C 651

—defendant then held property as bailee and by using part of it made that part her own, terminating bailment and right of rescission, 121 C 651

breach of warranty adequate ground for rescission of contract of purchase and recovery of purchase price, 128 C 9

§ 16. Fraud

sale of horse, “with faults,” *held* to be at vendee’s risk, 9 C 107

—aliter, if vendor make misrepresentations, 9 C 107

vendor may treat sale as void if goods are purchased with design not to pay for them, 16 C 71

—vendor may reclaim from attaching creditor, when, 16 C 71

executor or administrator cannot, as a rule, both sell and purchase, 18 C 303

—but the fraud may be constructive merely, 33 C 67

difference between stoppage and rescission for fraud, 20 C 58

sale by shipmaster and purchase in by his agent, *held* void, 23 C 157

false representations that another stood ready to purchase, avoids sale, 24 C 392

—inducement to purchase share in insolvent firm; liability, 24 C 392

false representations not alleged are admissible to prove scienter and on question of damages, 33 C 380

under statute plaintiff must prove debt as well as fraud, 36 C 104

exchange of animals; fraudulent representations, 42 C 12

—no defense that plaintiff has in fact received more than he gave, 42 C 13

to constitute fraud an intent not to pay must have existed, 42 C 329

vendor with right to rescind for fraud; as to third persons is bound to do so without unreasonable delay, 46 C 393

—such right to rescind is lost by delay, 46 C 393

—and by bringing suit for price; aliter, by suing for price of part resold to bona fide purchaser, 46 C 380

—evidence of reason for bringing such suit *held* admissible, 46 C 380

if party alleging, did not rely on the false representations, it is a case of fraud without damage, 49 C 332

sale will not be set aside for inadequacy of price in absence of actual fraud, where parties are competent and confidential relation does not exist, 49 C 390

that debtor had not property enough to at once pay all claims, falls far short of proving him guilty of fraud in buying goods, 54 C 415

fraudulent representations to obtain “general credit” *held* admissible against party making them, 55 C 267

to sustain action for fraud plaintiff must be actually deceived, 55 C 450

—it is not enough that defendant intended to deceive, 55 C 450

fraud alleged in sale of horse; evidence that defendant told plaintiff that if horse was sound he would be worth more money *held* admissible, 55 C 450

sale of securities by executor to legatee is voidable by latter when, 56 C 1

—sufficient if legatee repudiates sale within a reasonable time after discovery of the fraud, 56 C 1

statements made without knowledge of their truth or falsity, with a view to benefit, constitute fraud, 56 C 1

one cannot recover for fraud in a sale made on Sunday, 56 C 333

plaintiffs sold to A upon false representations that B was a partner and on credit of B; *held* B was not liable if without knowledge of the fraud, 62 C 39

—that A made the same representations to others is of no consequence, 62 C 39

one cannot be guilty of fraud committed by agent unless he participates, 62 C 159

—ratification of a fraudulent transaction without knowledge is not an adoption of the fraud, 62 C 159

one who has fraudulently represented herself as agent of another cannot maintain action for refusal to accept goods sold, 66 C 397

failure of wife to disclose that she is living apart from husband when she purchases goods, 77 C 572

right to return goods for fraud, 79 C 126

remedies of purchaser who has been defrauded, 86 C 100

—his right to return goods, 86 C 108

sale procured by fraud can be rescinded and consideration returned, or sale confirmed and damages obtained, 90 C 624

an agreement that one is to receive a stated amount weekly and a one-third interest is a “claim” against a business, 90 C 624

what damages are allowed in action of fraud, 91 C 404

separate purchases under a credit agreement may be treated separately; fraudulent credit, 91 C 482

evidence properly admitted as to whether bookkeeper was so acting as to make notice to him notice to defendant, 91 C 483

imputed knowledge sufficient to hold subpurchaser for fraud of original vendee, 91 C 483

§ 16 Sales

defrauded buyer may by his answer affirm contract in action by seller for purchase price, and counterclaim for fraud, though the counterclaim involves repudiation of sale because they are really two independent actions, 100 C 393

allegations *held* to state a case either of fraud or breach of warranty, 100 C 393

measure of damages in action for fraud in sale of chattel, 100 C 393

—all consequential damages resulting from fraud are recoverable, 100 C 393

—repairs necessary to put truck in condition, 100 C 393

representation that two States had adopted stop-signal device is one of fact, 100 C 492

—and actionable if plaintiff induced to contract thereby, 100 C 492

damages same for fraud or breach of warranty, 100 C 732

payment of instalments by buyer after knowledge of fraud is not waiver as a matter of law where action is not based on rescission but is brought to recover damages, 103 C 237

in action for fraudulent representations in a sale, vendor's knowledge of their falsity is essential; but not in action based on rescission where it is sufficient that the representations, though innocent, were material, 104 C 73

vendor under no duty to disclose facts ascertainable upon reasonable inquiry; when silence may amount to misrepresentation, 104 C 650

in action on note or bill given in sale of goods, fraud inducing sale is good defense between immediate parties, provided rescission made promptly and goods returned, 105 C 434

conclusion that seller of motor truck was guilty of fraud in misrepresenting year of manufacture upheld, 108 C 511

—his means of knowledge were such that his agent must be treated as having stated that he knew whereof he spoke, 108 C 511

plaintiff in action for misrepresentation of year of manufacture of car, *held* real purchaser, though registration in wife's name, 114 C 718

§ 17. Retention of Possession

§ 18. —In General; What Constitutes

vendee must take possession in reasonable time, 6 C 277, 44 C 128

—“reasonable time” construed as time fairly required for the act, and not with reference to mere convenience, 44 C 131

ratification of unauthorized possession after sale without delivery, *held* valid, 16 C 450

turning oxen around *held* not a change of possession, 16 C 505

the rule is one of policy as well as evidence, 20 C 23, 31 C 495, 32 C 410, 40 C 542, 41 C 301, 43 C 389

—and to be inflexibly maintained, 31 C 495, 41 C 301

facts showing only colorable change; change of sign *held* insufficient, 21 C 377

—so delivery and redelivery of key, 21 C 604

goods remaining in yard occupied in common by the parties; sale not void as a matter of law, 24 C 551

contract annulled; retention, use and fraudulent sale of horse by vendee under a new conditional sale *held* not to affect original vendor, 25 C 477

whether there has been retention, is a question of fact, 30 C 201

letting to vendor shortly after sale, *held* not justified by emergency, 31 C 495

sale of cattle by son working on father's farm; lease back to father; attachment as son's property *held* valid, 32 C 405

change must be actual, visible, and continued, 32 C 410, 44 C 489

cloth left in vendor's mill to be finished may be attached as vendor's though such sale is good between the parties, 37 C 550

sale void as to attaching creditors may be validated by delivery before attachment, 37 C 554

doctrine of, is a rule of positive law; does not, as such, apply to property located outside the State, 39 C 179

bona fide sale of goods and assignment of lease *held* not invalidated by retaining vendor as clerk, 40 C 542

exchange; conditional sale of horse received in exchange; attachment by creditor of vendee; *held* vendee had no vested title, 41 C 357

—fraudulent retention of possession of first horse *held* not to affect possession of horse received in exchange, 41 C 357

there must be requisite time to deliver, 44 C 130

—retention of hay in barn twelve days, *held* unreasonable, though vendee was unable to procure another barn, 44 C 128

—stipulation that property shall remain, *held* not a lease of barn, 44 C 128

creditor of one of joint vendors can disturb sale only to extent of the interest of that one, 44 C 277

goods paid for as made, and stored in factory occupied in part by vendor and owned by vendee; agreement to manufacture only for vendee; *held* such goods were not attachable as vendor's, 44 C 277

—rule not varied by dissolution of vendor firm and limited occupation of new firm, composed in part of same members, 44 C 277

whether there has been a valid change of possession is a mixed question of law and fact, 44 C 487, 14 C 529

—finding of court on, may be revised for error, 44 C 487

vendee's possession may be sufficient as against vendor and yet insufficient as against vendor's creditors, 44 C 490, 63 C 374

crops to remain lessor's until all contracts of lease fulfilled; lessor's possession *held* good as against creditors of lessee, 46 C 198

changing occupancy of warehouse and custodian of goods, *held* sufficient, 47 C 55

horse sold with real estate need not be removed if record of the land sale is made, 47 C 56

vendor cannot retain after a sale what does not then exist, 48 C 250

—or that which is already in vendee's possession, 48 C 255

—applied to colts born from mares sold without visible change, 48 C 250

sale of horse to servant without visible change *held* void as to creditors, 48 C 258

delivery *held* essential to pass title to non-existing chattels contracted for, though payment is made in advance, 48 C 306

—if a valid sale, as between the parties, it is still void as to creditors by retention of possession, 48 C 306

trustee in insolvency represents creditors and has their rights in a sale void as to them, 48 C 307

—fraud of debtor in sale void as to creditors, does not estop his trustee, 48 C 306

rule as to retention by husband after gift by him to wife, 51 C 562

—gift of horse with real estate, by husband to wife; horse exchanged for another; doctrine does not apply, 51 C 562

vendee taking possession after sale, but before attachment, can hold against creditors, 53 C 401

change of possession is not necessary where property is already in the visible possession of vendee, 54 C 83

doctrine *held* not to apply to a sale of goods in customhouse before payment of duty, 57 C 352

sale valid between the parties; no delivery is necessary as against third parties claiming as owners, 57 C 354

receiver cannot attack sale of property not belonging to his debtor, on ground of, 57 C 354

creditor cannot always assume that debtor is owner of all the personal property in his possession, 57 C 386

vendee purchased machinery and removed it; several months after returned it to vendor for painting and oiling; *held*, on facts, no

such retention as to invalidate sale, 61 C 34

—such repossession with suspicious circumstances would make sale colorable, 61 C 34

property kept in barn not owned by vendor; barn afterwards hired by vendee, with other circumstances, *held* not to be, 61 C 194

principle does not apply to personal property sold by sheriff on valid judgment, 62 C 186

—immaterial that execution creditor is the purchaser at the sale, 62 C 186

—but allowing debtor to remain in possession may cause inference of collusion, 62 C 186

—such inference may be overcome by proof by execution creditor, 62 C 186

when legal excuse for retention will protect sale, 62 C 193

creditor can attack sale only by attachment or levy, followed by proceedings to appropriate avails to payment of debt, 63 C 374
colorable delivery will not avoid rule, 68 C 389

law not changed by statute as to recording conditional sale, 70 C 505, 77 C 38

law not altogether applicable against a receiver, 71 C 345

in case of chattel mortgages, 72 C 510, 77 C 370

livery-stable keeper who buys out business and continues it at same place, 74 C 146

does not affect rights of parties, but sales or mortgages void as to bona fide third parties without notice; mere oral statement does not change possession, 86 C 372

paper pinned to a lumber pile, letters offering to sell, recorded deed of land, etc., not sufficient notice of sale, 89 C 439

expense of removing goods of no significance; what acts of ownership sufficiently indicate change of title, 89 C 439

creditors' and purchasers' rights are not affected by symbolic or constructive acceptance, 90 C 342

doctrine does not apply between parties to an agreement, 95 C 173

—rests on assumption of agreement valid as to all parties except creditors and bona fide purchasers, 95 C 173

—therefore cannot avail one who purchases mortgaged personal property and assumes payment of the mortgage, 95 C 173

a bona fide purchase by one who takes actual possession carries also the right to possession, in absence of any indication that anyone else had any such right, 99 C 582

bill of sale absolute in form but given as security ineffective as chattel mortgage without change of possession, 101 C 562

—hence where N delivered automobiles to plaintiff as security, then took them back,

§ 18 Sales

giving bill of sale and receiving conditional sale for amount of debt, N's creditors have precedence over plaintiff, 101 C 562
does not affect rights of parties to a sale between themselves, 105 C 766
—but renders sale invalid against subsequent creditors or bona fide purchasers without notice, 105 C 766
—effect of statute permitting it in case of certain chattel mortgages, 105 C 766
where vendee rents building in which property has been kept by vendor, former need not remove it, 114 C 523
—where property sold was automobile and vendee registered it in his name, doctrine *held* not to apply, 114 C 523
—doctrine applied in every case where there has not been an actual, visible and continued change of possession, 114 C 525
G company executed conditional sales contract of car to employee, and assigned it to C company who paid \$900, all parties knowing that it was not in fact a sale but purpose was to enable G company to raise money by the assignment, *held*
—that transaction was in effect a chattel mortgage with retention of possession by mortgagor, 116 C 487
—that it was invalid against creditors of G company and hence against receiver who succeeded to their rights, 116 C 487
C company paid distributor S company for cars delivered to dealer G company and took receipt; G company executed and recorded "trust receipt" for them as agent of C company agreeing to hold them in trust for latter and if it sold them for cash to turn proceeds over to latter; *held*
—that title passed to C company and never was in G company, 116 C 487
—that there was no retention of possession of previously owned property by G company with resulting deception of creditors as in case of chattel mortgage, 116 C 487
when C transferred truck to P by bill of sale with only colorable delivery and took it back by conditional bill of sale, *held* latter did not prevent application of rules in retention of possession, 117 C 270
sale of stock and good will of mercantile business was accompanied by incidents necessary to make it good against attaching creditor of vendor, 117 C 695
object of rule requiring change of possession upon a sale of personal property is prevention of fraud, 122 C 28
—creditors of vendor entitled to rely on his continued possession as indicating continued ownership, 122 C 28
—rule not applicable to situation where one in possession as conditional vendee agrees to surrender property to assignee of condi-

tional vendor, as such vendee was never owner of property, 122 C 28
—had equitable interest subject to attachment, but attaching creditor would take subject to interest of conditional vendor, 122 C 31
—and attachment and subsequent sale in suit against such vendee was conversion against assignee, 122 C 28
—concurring opinion arrives at same result without applying rule, on ground that attaching creditor had notice of rights of conditional vendor through record and could not hold property against him, 122 C 35
by mortgagor of personal property in New York; effect of, 122 C 100
effect of, under certain circumstances is to continue right of creditors of vendor to attach the property as still belonging to latter, 122 C 465
doctrine not so strict as to require that in all instances vendee shall take actual possession; sufficient if he takes steps in reasonable time so as to give notice he has acquired title, 126 C 704
—where plaintiff left car in garage for repairs, removed markers of brother, from whom she bought it, locked car and took out registration in own name, not such retention of possession by brother as to subject it to attachment, 126 C 704

§ 19. —As a Badge of Fraud

is a badge of fraud, 1 R 325, 5 D 379, 3 C 160, 431, 4 C 450, 5 C 199, 6 C 277, 9 C 63, 14 C 240, 529, 15 C 397, 16 C 346, 26 C 416, 37 C 508
presumption of fraud may be rebutted, 6 C 277
if unexplained is conclusive evidence of fraud, 9 C 63, 134, 216, 14 C 240, 16 C 346, 20 C 27, 30 C 201, 40 C 542, 41 C 301
facts *held* insufficient in explanation of, 14 C 240, 529
presumption is not repelled by proof of bona fide sale, 14 C 529, 16 C 363, 510, 43 C 388
—is repelled if immediate possession is impracticable, 16 C 364
—so if possession is taken in a reasonable time, 16 C 346
—rules of common law and civil law differ, 16 C 347
assignment for benefit of creditors not rendered fraudulent by continued possession of assignor, 17 C 319
retention is evidence of fraud to be regarded as conclusive where voluntary and unnecessary, 31 C 36
—what will and what will not excuse retention, 31 C 36
is conclusive evidence of colorable sale, 31 C 495

reason for presumption of fraud from retention, 43 C 389

—no presumption from mere possession of goods never owned by possessor, 43 C 389

—nor of goods purchased after original sale, though purchased with avails of such sale, 43 C 383

—aliter, if original sale was fraudulent, 43 C 384

—intermingling of such goods where original are distinguishable, has no effect, unless intermingled for fraudulent purpose, 43 C 384

retention renders the sale constructively fraudulent, 44 C 130

retention raises presumption of fraud only in favor of creditors or those in their position, 53 C 401, 63 C 374

presumption does not exist in retention of property exempt from execution, 53 C 401

—authorities reviewed, 53 C 402

fraud implied by retention of goods by one not their owner; limitation of rule, 72 C 504

as a badge of fraud, relates only to tangible property, not to shares of stock in a corporation, 87 C 601

change in possession in personal property sold necessary, or it will be a badge of fraud; acts necessary to show a change, 89 C 439

rule as to retention of possession by vendor or mortgagor of personal property does not affect rights of original parties between themselves, 95 C 172

in Texas retention of possession by vendor is merely prima facie evidence of fraud; burden upon vendee to explain, 99 C 582

—good faith of parties, if proved, would seem to be a sufficient explanation, 99 C 582

—charge *held* to have fully met all requirements of the law of Texas, 99 C 582

where plaintiff loaned money to company to enable it to purchase motors, took note and contract in form of conditional sale, but left motors in possession of company merely tagged in his name, *held* no justification on ground of sale with retention of possession, which would overcome presumption of fraud from company's retention of possession, 100 C 224

where no question of attachment or right thereto involved, that there was retention of possession nil sig., 122 C 465

§ 20. Conditional Sales

§ 21. —In General

purpose of statute; to be broadly construed, 70 C 230

does not change law as to retention of possession by vendor, 70 C 505, 77 C 38

where note and bill of sale represent purchase price, an assignment of the former carries benefit of the latter, 94 C 210

—if creditor becomes bankrupt after indorsement and trustee collects price, he must account to holder, 94 C 210

conditional bill of sale to secure purchase price is collateral security, 94 C 210

if attaching creditor releases and property is returned to vendor and resold in accordance with statute, creditor cannot again attach, 94 C 567

assignment of all vendor's interest in the property leaves him nothing to transfer, 98 C 212

registration of automobile by conditional vendee, 104 C 165

purpose of statute requiring recording conditional sales, 108 C 727

parol evidence to show that conditional bill of sale was not intended to warrant title to automobile admissible, 111 C 572

where seller assigned bill of sale and recorded it with assignment, later took substitute bill of sale and assigned it to another, taking possession of car by that other constituted conversion, 112 C 613

—recording of assignment attached to bill of sale as constructive notice of it, 112 C 617

—effect of assignment of first bill of sale was to pass title of car and seller had no further title to convey, 112 C 617

forfeiture of car used for transportation of liquor; exception cannot be made in favor of innocent owner or conditional vendor; proceeding is not criminal but one in rem, 112 C 618

forfeiture of car used for transportation of liquor where title is in conditional vendor, 113 C 766

two-year policy to cover car sold by conditional bill of sale providing eighteen months for payments, within terms of contract providing that seller might insure to "properly protect" interests, 116 C 246

in taking out insurance on car, as provided by conditional sales contract, to protect buyer's interest, sales company was his agent; it was authorized to accept policy for him; he was bound by its knowledge of its terms, 116 C 246

plaintiff bought car on conditional sale for \$1050 to which was added \$100 "finance charge" for which (less down payment) he gave his note; *held* transaction not usurious, 117 C 251

contract between owners of building and vendor of bowling alleys designating them as personal property was made for benefit of sellers and when buyer's obligation discharged property reverted to original condition, 124 C 60

§ 21 Sales

where under contract, resale of repossessed article necessary to determine damage, transfer to subsidiary of vendor with no cash passing, not such sale, 125 C 700

creditor of conditional vendee attaching goods sold can only claim rights of latter and is limited by conditions of conditional sales contract, 129 C 229

—conditional vendor could prevail against attaching officer where vendee was not in default and officer did not tender unpaid balance of purchase price, 129 C 229

purpose of requirement in statute that contract shall set forth "all conditions of such sale" is to apprise those who do business with vendee just what his interest is, 129 C 446

—under Trust Receipts Act, where conditional vendor F had given trust receipt for trucks to plaintiff who gave F liberty of sale and sale was made in ordinary course of business, vendee took them free of security interest held by plaintiff, 129 C 446

—existence of trust receipt in no sense a condition of the sale and statute did not require it to be set forth in contract, 129 C 446

—reference to F in sales contract as the seller was accurate statement, 129 C 446

—trust receipt transaction gave to plaintiff a lien and was in no sense transfer of title, and insofar as conditional sales contract represented title to be in F it spoke truth, 129 C 446

§ 22. —What Constitutes; Distinguished from Other Transactions

agreement to give bill of sale of organ when all instalments are paid, *held* a conditional sale, 48 C 268

—if organ is not actually purchased, a note for full price is without consideration, 48 C 268

contract for hiring piano *held* to be conditional sale, not lease, 50 C 228

—after default for several months, promise of vendee to pay arrears *held* not a ground of recovery as there was no new consideration, 50 C 228

purchase note *held* a part of the contract and should be read in it, 58 C 478

instrument *held* to be a conditional sale rather than a negotiable note, 60 C 402

contract *held* not a chattel mortgage, 62 C 38

if property is to pass, for agreed price, on performance of condition, it is conditional sale, whatever form it takes, 70 C 228

statute de conditional sales applies only to contracts by which the title is not to pass by delivery, but upon the performance of some subsequent condition, 71 C 165

delivery of goods on payment of, or agreement to pay, price, not conditional sale unless intent to make it so appears, 74 C 675
under agreement that engine is to remain a certain time the property of the vendor, then the vendee is to give notice if it is unsatisfactory, and engine to be taken out, conditional sale results; waiver of condition, 75 C 469

real nature of contract determines whether it is such sale; preliminary negotiations as evidence, 79 C 419

—agreement in contract of bailment or hire that promisee may purchase, and that rent will be applied on purchase price, *held* not to constitute conditional sale, 79 C 419

whether transaction is a conditional sale or mortgage, is determined by the intent and purpose of the parties and circumstances surrounding execution, 81 C 711

contract for renting and hiring *held* to be a conditional sale, 95 C 181

"lease" of motorcycle, fixing purchase price, providing for application of rentals to it and passing title where they reach its amount, *held* conditional sale, 97 C 571

whether transfer is conditional sale or chattel mortgage depends upon language of instrument and surrounding circumstances rather than upon the parties' belief as to effect of their acts, 100 C 223

—attempt to secure loan on motor truck without change of possession, *held* an absolute sale as to creditor, 100 C 223

defined, 100 C 223

a lease of personal property which is, in substance and effect, a conditional bill of sale, will be construed as such, 104 C 559

whether transaction is sale or mortgage is question of intent, 107 C 519

—if intended as security is latter, but if debt is extinguished or money not advanced as loan, it is former, 107 C 519

—agreement to resell or option to repurchase not conclusive that it is former, 107 C 519

—various circumstances which are to be considered, 107 C 519

—effect of mutuality of rights, seller's right to reconveyance and buyer's right to compel repayment, 107 C 519

—agreement between property owners' association and water company as to water mains, providing that, on advances made by association, mains should belong to it, but if money refunded they should be reconveyed to company, was sale, not mortgage, 107 C 519

where contract entitled "conditional bill of sale" authorizes repossession by vendor, disposition of property with retention of payments or sale and credit of proceeds upon

the price with recovery of balance, intent that title should remain in the seller implied though not expressly stated, 112 C 613

G company executed conditional sales contract of car to employee, and assigned it to C company who paid \$900, all parties knowing that it was not in fact a sale but purpose was to enable G company to raise money by the assignment; *held*

—that transaction was in effect a chattel mortgage with retention of possession by mortgagor, 116 C 487

—that it was invalid against creditors of G company and hence against receiver who succeeded to their rights, 116 C 487

C company paid distributor S company for cars delivered to dealer G company and took receipt; G company executed and recorded "trust receipt" for them as agent of C company agreeing to hold them in trust for latter and if it sold them for cash to turn proceeds over to latter; *held*

—that title passed to C company and never was in G company, 116 C 487

—that there was no retention of possession of previously owned property by G company with resulting deception of creditors as in case of chattel mortgage, 116 C 487

—that if transaction was conditional sale, contract was acknowledged and recorded in compliance with statute, 116 C 487

—that if it was consignment, transaction was bailment and cars not subject to attachment by creditor of bailee, 116 C 487

—that in either case title of C company was superior to that of receiver of G company, 116 C 487

C transferred truck to P, to whom he was indebted, by bill of sale with only colorable delivery and took it back by conditional bill of sale, no consideration passing; *held*

—transaction was in reality mortgage and void as to S, bona fide purchaser from C, 117 C 267

—conditional bill of sale between P and C did not prevent application of rules de retention of possession, 117 C 270

—but C was liable to P for conversion, 117 C 267

§ 23. —Validity and Operation

lease with contract for future sale on condition does not divest lessor of title, 40 C 148

—chattel is not subject to attachment by lessee's creditors, 40 C 148

conditional sale of liquors with right in vendee to sell; title to portion unsold to remain in vendor; right to sell regarded as a right to sell as property of vendor, 49 C 141, 57 C 386, 407

—rules of other States as to the validity of conditional sales against vendee's creditors, 49 C 148

conditional sale of liquors by agent; delivery in Connecticut; payment to be made in Connecticut; *held* Connecticut law governed, 49 C 141

sale and delivery, title not to pass until payment of price; vendor's title *held* good, 52 C 210

—even against vendee's creditors and subsequent bona fide purchasers, 52 C 210

validity of conditional sale is well established in this State, 54 C 80

sale and delivery on condition that vendee shall not own property until paid for, does not vest title in vendee, 56 C 70

in absence of fraud conditional sales *held* valid as against third parties, 57 C 386

—though delivery be accompanied by permission to sell, but as the property of the vendor, 57 C 386

—the condition may be that vendee shall pay not only the price of the goods but all other indebtedness due the vendor, 57 C 386

—the only requisite is that it be in good faith and not a cover for a pledge, 57 C 386

sale of liquors, vendor retaining title until payment, with power in vendee to sell, *held* conditional, 57 C 407

—vendor regarded as owner as against attaching creditor of vendee, 57 C 407

conditional sales are recognized and approved by statute, 57 C 415

transfer of goods by bill of absolute sale and actual possession taken by vendee; as against vendee's creditors, vendor cannot claim sale was conditional, 58 C 367

a sale will be held absolute and not conditional, when, 58 C 370

conditional sale of machinery; contract *held* an absolute promise to pay on expiration of credit, 58 C 464, 63 C 291

—right of vendee to take and use property until default and to title on payment, *held* a good consideration, 58 C 464

under statute original vendor may still replevy goods sold under an unrecorded contract of conditional sale from bona fide purchaser for value, 63 C 433

—where conditional vendee had acquired no title from vendor at time of suit, 63 C 433

—statute may operate against assigns of vendor or of his heirs, 63 C 433

—courts are not at liberty to speculate upon any supposed actual intention of the Legislature, 63 C 433

receiver of vendee not bound by unrecorded sale, nor estopped by terms of contract, 70 C 221

good faith in conditional sale is the test of its validity, 72 C 509

right to goods as between vendor and one purchasing of vendee who has apparent authority to sell, 72 C 513

§ 23 Sales

law of State where sale is to be executed or to have its beneficial effect determines its validity, 73 C 132

construction of statute, its purpose, meaning of "contract," reasonable time to record, and effect of failure to record, 75 C 165, 77 C 276

if sale not recorded, it is absolute as regards one who assumes payment of price, 75 C 635

"contract" embraces all kinds of writings by which conditional sale may be made; instrument valid though it did not show terms of sale were accepted by vendor or delivery of goods, 77 C 276

vendee's agent may take acknowledgment, 77 C 276

meaning of "household furniture" in statute; linoleum, 78 C 273

effect where interest of vendee is attached and that of vendor is transferred to attaching party; prior defaults; condition that payments are dependent on continued use and possession, 79 C 570

recording of conditional sale made after an error in the contract has been corrected and more than a year after recording of the imperfect contract is not within a reasonable time, 87 C 369

conditional sale, not made in accordance with law, considered absolute sale, 87 C 370

—third parties must have acquired an interest in goods before vendor took them back if they wish to contest his claim, 87 C 370

conditional bill of sale unacknowledged and unrecorded, not good against third parties, 94 C 567

one who takes conditional bill of sale of mortgaged personal property cannot object to insufficiency of the description, 95 C 172

effect of conditional sale of mortgaged chattels with assumption of mortgage by buyer, 95 C 172

—of attachment by purchaser, 95 C 172

contract for renting and hiring *held* to be a conditional sale, 95 C 181

effect of failure to acknowledge and record, 97 C 574

statute does not require a conditional sale of a piano to be in writing, 98 C 212

—nor that an assignment of such contract shall be written, 98 C 212

—written assignment in blank *held* admissible in evidence, when, 98 C 212

electric light fixtures are household furniture; therefore, unrecorded conditional bill of sale valid, 101 C 1

lender took bill of sale of automobile as security and gave borrower conditional bill of sale; borrower retained possession; *held*

automobile subject to attachment by borrower's creditors, 101 C 562

defectively executed conditional sale is absolute sale as to creditors and bona fide purchasers, 102 C 390

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SCHOOLS AND SCHOOL DISTRICTS

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 3. POWERS AND FUNCTIONS OF DISTRICTS; LIABILITIES
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§ 1 Schools and School Districts

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§ 3 Schools and School Districts

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SET-OFF, RECOUPMENT AND COUNTERCLAIM

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- 2. ESSENTIAL ELEMENTS GENERALLY
- 3. MUTUALITY OF PARTIES
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§ 2 Set-Off, Recoupment and Counterclaim

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 - particularly as regards a bank holding an unmatured note of an insolvent depositor, 108 C 497
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SETTLING TITLE

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SPECIFIC PERFORMANCE

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contract de land; *held* averments of bill insufficient to justify admission of parol, or to sustain decree, 39 C 170

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—nor against husband alone, 47 C 291

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- it is not enough that vendor has a remedy at law, 63 C 109
- court will, however, sometimes refuse decree in his favor on ground of special hardship, 63 C 109
- if one of two joint plaintiffs is not entitled to transfer, other cannot have remedy, 71 C 171
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- declaration of agent of vendor, made to induce sale, admissible in action of specific performance, 88 C 547
- declaration by a general agent, is admissible in suit for specific performance of a contract made by him, 96 C 84
- terms of decree where purchaser has been in possession of land, 98 C 116
- agreement to assign patents and patent rights acquired in future, 102 C 169
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- form of decree, 102 C 180
- perpetually restraining defendant from use of patented article too broad as running beyond patent and forbidding proper repairs to articles already secured, 102 C 193
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- as incident to decree of specific performance court may award purchaser damages for wrongful withholding of property, 124 C 569

SPECIFIC RESTITUTION

- where defendant in effect agreed to support plaintiff for life and assume duties of son, for which she conveyed him property, and defendant failed to perform, deed was set aside and property restored to plaintiff, 39 C 10
- where plaintiff, an old man, conveyed homestead to son and latter agreed to give him home and support him but failed to do so, equity decreed reconveyance by son, 41 C 474
- right of rescission and restitution as alternative remedy to damages where aggrieved party has performed fully or in part, and wishes to recover what he has given or its value, 121 C 548
- such a right may exist when land has been conveyed and grantee fails to keep a promise made in consideration, though ordinarily specific performance or judgment for purchase price are adequate, 121 C 548
- a transfer of land in consideration of promise of grantee to support grantor for life, and a subsequent breach of that promise, presents a case for specific restitution, 121 C 548
- it may be by reconveyance or cancellation of the deed; as this is equitable remedy the decree will be made on such terms as justice may require, 121 C 548
- in instant case defendants were not entitled to any reimbursement for their expenditures on the property, having received from plaintiff more than they disbursed, 121 C 548

STATE

- § 1. IN GENERAL
- 2. RIGHTS AND LIABILITIES
- 3. ACTIONS

See also BOUNDARIES; CONSTITUTIONAL LAW; EMINENT DOMAIN;
GENERAL ASSEMBLY; WATERS

§ 1. In General

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- nature and extent of state's interest in old State House at Hartford, 49 C 560
- State has no authority to subject land out of its jurisdiction to injury, though *damnum absque injuria* here, 52 C 570
- so *held* where works constructed to improve Connecticut River at Enfield injured land in Massachusetts, 52 C 570
- reports of Supreme Court are property of State, 53 C 419
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State as trustee; if gift over in case of nonacceptance, acceptance becomes condition precedent; must be by Legislature; what constitutes; defeat of resolution as to bequest constitutes refusal, 69 C 64

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that plaintiff received payment from State for injuries received in line of duty no defense to action against surgeon for malpractice in treating injuries, 115 C 563

—analogy to compensation law, 115 C 563

where State continuously used land as park for fifteen years, owner of right to mine it *held* to have abandoned right, 121 C 43

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—State is trustee for public and riparian proprietor's rights are in nature of franchise, 122 C 263

definition of word, 127 C 447

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word may include District of Columbia or the United States if to do so will carry out legislative intent, 128 C 448

meaning of provision in statute as to retirement pay of state officers that they must have had a certain number of "years of service"; officer must have devoted a substantial part of his time to such service; services at irregular intervals of a few days, unpaid or paid only on a per diem basis or by others, are not sufficient, 129 C 266

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State, in administering school fund, acts in sovereign capacity; not affected by discharge in bankruptcy of person indebted to school fund as borrower, 47 C 400

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—life tenant then holds as trustee for next of kin, 51 C 440

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State has right to interfere for protection of dependent and neglected children, by statute, 61 C 266

—its action is not to be set aside upon mere demand of parent asserting his natural rights, 61 C 266

—so *held* on habeas corpus, 61 C 266

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Congress cannot require courts of a State to enforce newly created rights, if they are not permitted by state law, 82 C 352

state's right to engage in commerce antedates Constitution of United States, 82 C 352

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open land granted to early proprietors but not allotted by them may be regranted, 88 C 8

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§ 2 State

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statute de state-aid and trunk-line highways examined and construed, 109 C 336

—does not modify obligation of towns for avenues of travel of only local concern, such as sidewalks, 109 C 336

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—by granting name to corporation, cannot confer power to use it tortiously, 110 C 13

rights conferred on national banks prevail over attempted curtailment by State, 110 C 13

—such as depriving of trust powers, escheating deposits or suing in corporate name, 110 C 13

—but otherwise subject to state regulation, 110 C 13

regulation of production, marketing and sale of milk within police power of State; standards, classes, regulatory provisions, delegation of power, 111 C 433

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—exception where express grant of power or matter is of purely local concern, 111 C 433

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statute construed and *held* to place state deposits on parity with other deposits in bank or trust company in receivership, 115 C 393

—withdraws these companies from class of insolvents to which priorities in general insolvency statutes apply, 115 C 393

—and deposits by State of trust funds under law or will not entitled to special privilege of preference, 115 C 393

State by acceptance of funds of Agricultural College and the like becomes trustee subject to terms of statute or will creating fund, 115 C 393

duty of maintaining state highways having been imposed upon highway commissioner, liability for defects is subject to same limitations as previously applied to municipalities, 116 C 241

one whose rights are subject to state restriction cannot remove them from power of the State by making a contract about them, 118 C 79

—the contract will carry the infirmity of the subject matter, 118 C 79

contracts must be understood as made in reference to possible interference of the government, and no obligation of contract can extend to defeat the legitimate government authority, 118 C 79

State sued trustee under will of A for expenditures made for support of C in state hospital; will provided trust fund income or principal to be spent for C's support in trustee's discretion; *held* this was spendthrift trust not subject to attachment or execution by creditors of beneficiary, 119 C 508

—nor could State recover under statute giving it right of reimbursement against person or estate, as C had no estate, 119 C 508

—nil sig. that State is not contract creditor but acted in performance of governmental duty, 119 C 511

state law dealing only with state matters is valid though it may incidentally affect interstate commerce, unless it comes in conflict with some valid statute of the United States on that subject, 122 C 275

act establishing department of public works did not deprive highway commissioner of jurisdiction over layout, construction, etc., of state and state-aid highways or limit or impair that jurisdiction or his powers and duties by transferring them to department or commissioner of public works, 124 C 20

—recommendations of commission for reorganization of state departments legitimate aids in construing bill which was pro tanto response to those recommendations, 124 C 20

when town accepted lands for park it did so as representative of State in exercise of one of its functions, and obligations assumed by it became obligations of State, 129 C 106

—State itself cannot receive gift of property charged with certain use and legally depart from that use, 129 C 106

—but State may take it upon making compensation, as all property is held subject to right of State to take it for public use, including that already devoted to public use, 129 C 106

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§ 3. Actions

action of debt in name of state treasurer for penalty arising from violation of statute de sale of liquor, penalty being for use of State, could not be sustained, 6 C 312

action of debt in name of state treasurer, to recover fine and costs imposed by judgment, not sustainable, 9 C 267

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State, seeking equity, must do equity; defense or cross-complaint may be made to action by, 81 C 9

city has no equity to claim priority for lien established under authority of State as against State, 81 C 9

State cannot be sued or deprived of rights except by its consent, 81 C 11

State is immune from legal process, mesne or final, and is not included under any general words in a statute, 82 C 392

—costs are not payable by State unless specifically provided for, 82 C 392

—successful appellant in criminal action is not entitled to costs, 82 C 392

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—State is immune from legal process mesne or final, 111 C 432

costs in mandamus cannot be taxed against State, but State may recover them from defendant, 112 C 665

State cannot be sued for illegal entry of land by highway commissioner; nor can latter be sued in his official capacity, 113 C 651

State can collect tax from gasoline distributor who has collected it from consumer by action in name of treasurer though act does not state which officer is to enforce payment, 115 C 554

invalidity of act of 1929 authorizing state treasurer to sue for tax was cured when suit was brought; *held* treasurer had power to bring it though tax accrued before validating act, 115 C 554

whether an action is one brought by the State is decided not by nominal party on the record, but by effect of judgment or decree which can be entered, 116 C 119

—State is real party when relief sought inures to it alone, or action will deprive State of funds or property, 116 C 119

application by state park and forest commission for assessment of compensation under statute giving it power to take land in name of State for which compensation is paid by State is case "brought by the State," 116 C 119

—and therefore comes under statute providing that state referee shall assess damages in actions by State to condemn land, 116 C 119

writ or error brought by defendant where State was plaintiff, 119 C 217

—while State cannot be made defendant without its consent, where it invokes jurisdiction it subjects itself to any proper cross-demand, 119 C 217

—and writ of error, though independent action in procedural sense, is no less an attack on original judgment than an appeal, 119 C 217

—original judgment cannot be pleaded in bar, 119 C 220

—effect of reversal is to destroy original judgment, 119 C 221

—and by bringing original action State waives its immunity as regards writ of error, 119 C 217

unless expressly authorized, no action at law lies against State, 128 C 707

in bringing matter of award of damages for taking of land into court, highway commissioner was representative of State and his acts are in effect its acts, 129 C 113

when State comes into court for relief it subjects itself to jurisdiction of court, which may determine where equities lie, and State is bound by its decree, 129 C 113
declaratory judgment as to general right to recover against State not proper when State not party, 129 C 275

STATE PRISON

See PRISONS

STATE REFEREES

See COMMITTEES AND REFEREES

STATE'S ATTORNEYS

See also CRIMINAL LAW AND PROCEDURE § 13; QUO WARRANTO;
TRIAL § 3

- state's attorneys are informing officers with-
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criminal prosecutions, 1 R 198
- moneys from bonds in criminal prosecutions,
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525
- duty of state's attorney to sue to enforce
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- state's attorney may enforce order of railroad
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59 C 408
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- information by state's attorney lies for as-
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ute allows sentence which may cover life,
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- state's attorney may properly be a party to
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- should apply to Probate Court to fill
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60 C 325
- powers; issuing original information in Su-
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- where it was claimed that state's attorney
was actuated by personal resentment, *held*
that court, by appointing impartial counsel
and in other respects, properly protected
rights of defendant, 88 C 447
- nature of office and duty in prosecution of
criminals; in arguing case to jury, 96 C
160, 97 C 269
- duty of state's attorney to apprise court de
intention of State to offer evidence of con-
fession by one of accused, upon motion
for separate trials by counsel for prisoners,
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- where assistant is authorized to act in ab-
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- assistant in Fairfield County; signing appli-
cation for mandamus, 99 C 219
- duty as regards habeas corpus in extradition
matter, 100 C 298
- argument of state's attorney improper and
unfair in using certain evidence of San
Francisco bomb outrage to imply that ac-
cused, prosecuted for soliciting strikers to
violence, intended similar outrage on day
of Yale-Harvard football game, 102 C 708
- rising of officers about accused *held* not to
have been theatrical display designed by
state's attorney, 103 C 453
- argument in murder case *held* not improper,
103 C 455
- to be erroneous, impropriety must be
flagrant, 103 C 477
- right of state's attorney to mandamus to en-
force public duty in his own name as well
as at relation of individual, 103 C 608
- act authorizing employment of private de-
tectives construed, 104 C 1
- right of tax commissioner to bring man-
damus does not supersede pre-existing right
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- permitting state's attorney to ask series of
questions not within proper cross-examina-
tion *held* not prejudicial, 105 C 115
- failure of accused to testify cannot be com-
mented on; but if he does take stand, his
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- state's attorney may file original information
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- proper party to bring mandamus to compel
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108 C 251
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suit no defense, 108 C 251
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- statement by state's attorney of reason for
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icism of accused's counsel, 109 C 394
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and suggestions of a purpose to create an
unfair prejudice against accused on trial
or appeal discountenanced, 109 C 395
- remark of state's attorney not ground for new
trial in absence of objection at time, 110 C
55

K arrested by city charged with idleness and cash bail deposited; later charged with felonies but not presented, and bond forfeited for not appearing on idleness charge; *held* city treasurer entitled to money, not state's attorney, 119 C 22

where state's case dependent almost entirely on testimony of S, and defendant sought to discredit S by showing he had been promised immunity for his testimony, statement of state's attorney that no promise of exemption had been made *held* reversible error, 120 C 486

—especially as no admonition to disregard statement was given by court, 120 C 486

—and prestige and confidence pertaining to office, and personal reputation for probity of state's attorney, gave finality to statement making it the more prejudicial, 120 C 486

—that it was made impulsively and upon strong provocation, *nil sig.*, 120 C 486

presence in grand jury room, 126 C 60 and see GRAND JURY

court properly found state's attorney and assistant for judicial district of Waterbury disqualified and appointed special state's attorney, 127 C 543

—fair intendment of statute covers judicial district of Waterbury, 127 C 544

—and if there was any defect in appointments, those appointed were at least de facto officers, 127 C 544

duty in criminal case to offer every available witness whose testimony would aid court, 128 C 40

information disclosed to state's attorney for purpose of enabling him to perform duties of office is privileged upon grounds of public policy, 128 C 124

—it is his duty, however, to see that all evidence tending to aid in ascertaining truth be laid before court, whether or not it is consistent with defendant's guilt, 128 C 124

STATUTE AGAINST PERPETUITIES

See PERPETUITIES

STATUTE OF CHARITABLE USES

See CHARITIES

STATUTE OF FRAUDS

§ 1. IN GENERAL

2. SPECIAL PROMISE OF EXECUTOR OR ADMINISTRATOR

3. SPECIAL PROMISE TO ANSWER FOR DEBT, DEFAULT OR MISCARRIAGE OF ANOTHER

4. AGREEMENT MADE UPON CONSIDERATION OF MARRIAGE

5. AGREEMENT RESPECTING REAL ESTATE

6. —In General

7. —Part Performance

8. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR

9. PAROL AGREEMENT FOR LEASING REAL ESTATE

10. CONTRACT FOR SALE OF GOODS OR CHOSSES IN ACTION

11. —In General

12. —Acceptance; Receipt; Part Payment

13. NATURE AND REQUISITES OF MEMORANDUM

14. PLEADING AND EVIDENCE

§ 1. In General

promise raised by operation of law is not within statute, 1 R 150

fraud will take case out of the statute, 2 R 163

consideration of promise need not be expressed in writing, 6 C 81, 8 C 10

a discharge of a contract within the statute is no consideration for a parol promise, 15 C 400

a beneficial statute, and not to be narrowed by too rigid a construction, 15 C 404

necessity of a consideration is not altered by the statute, 22 C 321, 31 C 102

§ 1 Statute of Frauds

- statute only forbids suit; does not make contract void, 23 C 17, 36 C 45
- a contract within statute while executory is without legal effect, 25 C 188
- contract within statute is not void, but remedy only is denied, 36 C 45
- one party not permitted, in equity, to take shelter behind the statute and thereby perpetrate a fraud, actual or constructive, on the other party, 50 C 472
- a defendant may refuse to take advantage of the statute if he so elects, 52 C 475
- statute does not extend to trusts arising by operation of law, 59 C 196
 - nor to express agreement identical with the agreement so implied, 59 C 196
- statute is just as binding in courts of equity as in courts of law, 60 C 53
- a contract void under the statute is void for all purposes, 60 C 363
- contract within statute cannot be used in defense to defeat a demand otherwise legal and just, 80 C 267
- if there is written evidence of execution of a contract, the question as to whether or not it was ever made, may be passed upon, 82 C 293
- statute regards promises only, not their consideration, 83 C 688
- an oral understanding, as to means of carrying into effect a written contract, is not within the statute, 90 C 317
- there must be a memorandum to support an action on breach of contract as well as for specific performance, 91 C 29
- no action can be maintained or damages recovered for enforcement of an oral agreement within the statute, 92 C 416
- mere unconscionable advantage secured is not enough, although it might prevent pleading of the statute, in an equitable case, 92 C 416
- court cannot reform agreement within the statute by adding new terms derived from oral evidence and enforce it in that form, 95 C 211
 - if there is clerical error, it can construe and enforce the contract, 95 C 211
- damages for fraudulent representations are recoverable though made in connection with agreement within statute, 97 C 529
 - such an action is not one upon the agreement, 97 C 529
- parties may not dispense with requirements of statute by oral agreement, 100 C 57
- plaintiff may recover in quantum meruit where contract is unenforceable, provided he does not rely entirely on the contract, 101 C 58
- equity cannot reform contract in absence of fraud by introducing new terms and then enforce it as sufficient under Statute of Frauds; nor can such a claim prevail when interposed as a defense to an action by other party, 103 C 285
- basis of recovery for improvements made under oral contract which vendor refuses to perform, 107 C 181
- when expenditures made under unenforceable contract are recoverable, 108 C 683
 - elements necessary to state to recover deposit made on purchase price, 108 C 683
 - where owner has entered into unenforceable contract to sell to S and later does sell to C, he is not liable to S on ground of conspiracy, 108 C 683
- where claim that contract was within statute not made on trial it will not be considered on appeal, 109 C 593
- effect of full performance by plaintiff, 109 C 598
- contract invalid within Statute of Frauds cannot be used to defeat a claim otherwise legal and just, 114 C 539
- one who has rendered services under an agreement to receive compensation by devise of land, unenforceable because of Statute of Frauds, may maintain an action for the services rendered, 116 C 108
 - measure of damages is reasonable value of services and not that of the property agreed to be conveyed, 116 C 108
- does not extend to trusts arising by operation of law, 121 C 159
- unless prevented by Statute of Frauds, written contract may ordinarily be modified by parol agreement after its execution, 121 C 182
- statute does not prevent proof of oral agreement modifying written contract within statute when that contract has been fully performed, 121 C 186
- no action can be maintained for the direct enforcement of an oral agreement which is within scope of the statute and no damages can be recovered for its breach, 122 C 507
- statute does not make void the contract to which limitation applies but affects only the remedy, 124 C 507
 - it is defense therefore which may be effectively waived, 124 C 507
- one may become estopped to set up statute by conduct sufficient to constitute estoppel by usual rules, 124 C 507
- doctrine of part performance as related to Statute of Frauds is based on estoppel, 128 C 619
- where provisions of instrument bring it within statute, later oral contract altering it not enforceable unless it is a complete contract itself and not within statute, 129 C 682

§ 2. Special Promise of Executor or Administrator

oral promise by administrator to submit claim of estate to arbitration, *held* not within statute, 2 C 691
 promise by administrator without assets is deemed personal and within statute, 22 C 317
 —aliter, when administrator has assets, 22 C 317
 oral promise of administrator to pay costs of suit, *held* personal, and not within statute, 28 C 544
 applies to special promise made by the executor or administrator to pay, out of his own estate, what he is already liable to pay in his representative capacity, 60 C 71

§ 3. Special Promise to Answer for Debt, Default or Miscarriage of Another

release of debtor on promise of third person to produce him or pay debt; promise *held* within statute, 1 R 57
 board of son for two years on father's verbal promise to pay; the consideration being a continuing one and fully executed, the promise is not within statute, 1 R 90
 promise to pay damages on failure of judgment against third person, and on forbearance to sue, is within statute, 2 D 457
 oral promise of principal to indemnify agent properly acting, *held* not within statute, 1 C 519
 undertaking of assignee accepting trust *held* not within statute, 3 C 277
 oral promise by discharged indorser to pay note if maker be not sued, *held* within statute, 4 C 119, 125
 "special promise" is actual, not one implied by law, 6 C 85
 if executed on one side, the contract is thereby taken out of statute, 7 C 224
 parol proof of special contract of indorser of nonnegotiable note *held* admissible, 16 C 234
 —but not to prove a mere collateral suretyship, 16 C 234
 agreement of A to pay B one-half C might recover of D, *held* not within statute, 16 C 549
 agreement of A to pay for such articles as B should furnish C, *held* not within statute, 17 C 115
 contract of bailee under officer's receipt, *held* not within statute, 20 C 486
 promise to A to pay his debts due others *held* not within statute as to A, 22 C 317
 —but *held* within as to creditors of A, 31 C 95
 this clause is applicable only to promise to one to whom another is responsible, 22 C 317, 26 C 109

agreement with contractor de erection of church, *held* not within statute, 23 C 545
 assumption of firm debts by succeeding corporation *held* valid, 26 C 96
 —written vote of corporation *held* a compliance with statute, 26 C 96
 agreement of administrator on settlement of suit against estate to pay costs not within statute and he is personally liable therefor, 28 C 545
 promise of A to B to pay B's debt in consideration of delivery of property by B to A, *held* within statute, as to creditor, 31 C 95
 action on promise to pay debt of another *held* not maintainable by stranger to consideration, 31 C 95
 note made to plaintiff at defendant's request and indorsed to defendant for his accommodation; promise by defendant to plaintiff to save him harmless, *held* not within statute, 31 C 361
 —if no credit is given third person and consideration does not move from him and he is not benefited, the promise is not within statute, 31 C 361
 promise which discharges debtor and assumes new obligation, *held* not within statute, 35 C 343
 —aliter, if debtor continues liable as before, 35 C 343, 41 C 196
 oral promise to answer for deficiency of tax collector, *held* within statute, 41 C 191
 promise by grantee in deed to assume mortgage debt, *held* not within statute, 42 C 245
 —is an original contract, not one of indemnity, 42 C 245
 oral acceptance of bill of exchange is not "special promise" within statute, 46 C 90
 oral promise by third person, to save indorser harmless, *held* within statute, 52 C 464
 statute does not apply to promise to pay another with funds of promisee, 53 C 175
 oral promise by third person to pay tax if collector would forbear to levy, is within statute, 60 C 71
 —where delinquent taxpayer still continues liable, 60 C 71
 —aliter, if the arrangement releases the original debtor, 60 C 76
 oral agreement to pay funds received of promisee, to his creditor, is not within statute, 60 C 80
 rule stated for determining whether a given promise is within statute or not, 60 C 71
 —if promise is merely collateral to the original debt, it must be in writing, whatever the consideration, 60 C 71
 oral promise of owner of building to pay subcontractor, if the contractor did not, is within statute, 60 C 471

§ 3 Statute of Frauds

- defendant's oral promise to pay plaintiff his commissions for securing actors, out of latter's salary, assented to by them, *held* not within statute, 62 C 51
- oral contract of owner, after failure of original contractor, with subcontractor for completion of his work, *held* an original undertaking and not within statute, 62 C 84
- agreement to indemnify surety is not within the statute, 64 C 264
- promise of officer of corporation to pay its debt is within statute, 76 C 41
- where expressed promise to pay debts of another is not enforceable unless in writing, no promise can be implied, 82 C 178
- corporation A creates another corporation, B, which issues bonds secured by a mortgage to a trust company; the obligation to pay trust company for its services is on B, and A's agreement to pay it would be to answer for the debt of another and within the statute, 82 C 178
- where benefit for promisor is inducement for an oral promise, it is not one to answer for debt or default of another, 83 C 686
- oral request to be surety on a bond of third person in a criminal case with promise to indemnify against loss, is not under the statute, 83 C 686
- oral promise of head of concern to pay for all oil used by his drivers is an original undertaking and not within the statute, 92 C 587
- promise to answer for debt of another distinguished from one of direct indemnity, 93 C 260
- statute does not apply to recovery by one from another with whom he has joined in a common enterprise, 93 C 576
- oral promise made to debtor to pay debtor's own debts not within statute, 93 C 576
- statute does not apply where plaintiff acted for himself as well as agent for defendant, 93 C 576
- application of Statute of Frauds to case of sidewalk contractor who would not take job from general contractor unless landowner assured payment, 94 C 502
- promise to pay for doctor's services to child injured by promisor's automobile, 99 C 163
- such promise is an original one and not within the statute, 99 C 163
- provision by father to pay for coat purchased by daughter *held* not a promise to pay the debt of another, 107 C 52
- agreement to return price of stock if buyer dissatisfied, not within, 109 C 593
- distinction between promise to answer for debt or default of another and original promise not in statute, discussed, 112 C 385
- benefit to promisor major consideration but not conclusive, 112 C 385
- promise to see that contract would be performed *held* original undertaking, 112 C 385
- where building under construction was transferred to trustee to complete and he promised to pay for services engaged by owner, whether promise was one to pay debt of owner or based on his responsibility as trustee, is question of fact, 113 C 448
- where contract appointed defendant agent of plaintiff for sale of certain goods and agreements as to specific goods were made between purchaser and plaintiff by defendant as its agent, but court concluded that sales were made directly to defendant, no basis for claiming that contract was to pay debt of another, 119 C 603
- where plaintiff made loan to one person, to secure which note and mortgage of another was given and defendant claimed that other to be debtor, no question of promise to answer for debt of another was involved, 120 C 621
- agreement by town in possession of truck with creditor who had attached it, to divide earnings between itself, owner and creditor, not a promise to pay the debt of another, 121 C 290
- agreement to indemnify sureties on bail bond against loss from default of appearance an original undertaking and is not agreement to answer for debt or default of another, 122 C 21
- undertaking by person not before liable for purpose of securing or performing some duty for which party for whom it is made continues liable, is within, as special promise to answer for debt, default or miscarriage of another, 124 C 383
- oral promise to pay one's own debt not within, 124 C 383
- if there is benefit to promisor which he did not before and would not otherwise enjoy, and act is done on his request and credit, there ordinarily arises original undertaking not within statute, 124 C 383
- defendant's promise to see that balance due on truck was paid, in return for which plaintiff took new conditional bill of sale on it from corporation in place of one from defendant, not a new and collateral undertaking but reaffirmance of existing obligation; not within statute, 124 C 383
- undertaking by party not before liable, for performance of same duty for which party for whom undertaking is made continues liable, is within, as special promise to answer for debt, default or miscarriage of another, 125 C 491

—promise by union to pay attorney's fee due from local committee, *held* within statute, 125 C 491

contention that agreement of C to pay amount specified in contract of plaintiffs with A was unenforceable because oral, negatived by finding that C's promise was direct promise to plaintiff, not conditioned upon failure of A, 126 C 579

—question as to whom credit was given, one of fact; conclusion that plaintiffs looked for payment to C as primarily responsible, justified, 126 C 579

§ 4. Agreement Made upon Consideration of Marriage

oral contract to marry is not within statute, 20 C 496

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§ 5. Agreement respecting Real Estate

§ 6. —In General

oral promise of grantor to pay grantee for any deficiency in quantity described, *held* within statute, K 22

—aliter, 1 R 75

—grantee's agreement at sale to pay more for any excess, *held* within statute, 1 D 23

assumpsit lies for rents and profits, without a writing, 1 R 233

delivery of deed in escrow; conditions provable by parol as between parties, 2 R 81

oral promise to pay reasonable sum for use and occupation for term of years *held* not within statute, 2 R 149

oral contract to convey or pay penalty will not support action for penalty, 2 R 498

agreement to carry on trade in a particular shop *held* not within statute, 3 D 484

oral promise not to use land in certain manner, *held* not within statute, 3 D 484, 61 C 476

oral agreement for sale of fixtures capable of separation, *held* not within statute, 3 D 484

partial fulfillment authorizes specific performance or return of money, 5 D 67

action on note conditioned on performance of oral agreement de land, *held* sustainable, 2 C 302

—payee may show performance of conditions, 2 C 302

oral agreement to share profits of land speculation, *held* not within statute, 4 C 568

parol evidence of express trust varying effect of deed, *held* inadmissible, in absence of any fraud, accident, or mistake, 6 C 285

implied trust de purchase and ownership of land is provable by parol, 16 C 388, 35 C 165

—also an express trust, if partially performed, 16 C 388

oral agreement to build and rent store with wharf for three years, *held* within statute, 18 C 222

oral agreement not taken out of statute at law, unless performance be complete, 18 C 222

there can be no recovery at law for breach of a contract within statute, 18 C 231

plaintiff cannot rectify writing by parol and then enforce contract as rectified, 19 C 63

—defendant may, however, stand on the writing simply in defense, 19 C 63

buildings, crops, and earth itself, sold to be separated from land, are personalty under statute, 19 C 165

oral agreement for diversion of water *held* within statute, 23 C 214

right to erect building on land, is an "interest" therein, 25 C 239

parol license to erect substantial building, *held* within statute; such license is revocable, 25 C 239

oral agreement de sale, pending suit, is within statute, 27 C 307

oral agreement to dispose of equitable interest in land, *held* within statute, 27 C 307

—mere payment in part execution will not remove case from statute, 27 C 307

partition of divisional fence by parol, *held* not within statute, 29 C 429

oral agreement that builder should own building erected on promisor's land, *held* not within statute, 34 C 523

contracting vendor, as well as vendee, is entitled to specific performance, 58 C 12

deed to wife by husband and parol agreement of wife to recovery at his request; *held* performance by husband removed case from the operation of the statute, 59 C 117

statute does not extend to trusts arising by operation of law, 59 C 188

—parol evidence to reinforce and confirm such trust *held* admissible, 59 C 188

parol promise to devise real estate to plaintiff is within statute, 60 C 43

agreement contemplates a transfer of some portion of the title, 61 C 483

oral agreement not to carry on a particular kind of business on premises sold, *held* not within statute, 61 C 483

oral promise by grantor to repay grantee the difference in value between the actual frontage and the frontage stated in deed, *held* not within statute, 62 C 44

stipulations collateral to the contract of sale, but contained therein, may be enforced, 62 C 46

§ 6 Statute of Frauds

- if the action does not tend to enforce the sale or purchase of the interest in land, 62 C 46
- oral agreement to convey land in consideration of services rendered, *held* within statute, 62 C 370
- oral promise to will one's property to another, in consideration of the latter's services and companionship, is within statute if promisor leave real, as well as personal, estate, 63 C 530
- such contract a court of equity cannot specifically enforce, 63 C 530
- fact that promisee has acted upon and complied with the terms of the promise will not take case out of the statute, 63 C 530
- express trust of real estate is within, 66 C 499, 75 C 1
- offer of mortgagee at auction sale of mortgaged property to let certain sums "remain" on each parcel of land, is within statute, 70 C 92
- contract with real-estate broker for his services not within statute, 76 C 308, 79 C 297
- obligation of water company to sell plant to town, arising from acceptance of latter's subscription under resolution of Legislature providing for such sale, not within statute, 80 C 646
- oral promise of grantee to hold in trust land conveyed will support claim for breach of the promise against his estate; Illinois law, 81 C 433
- parol evidence may be given as to promise to account for money received from sale of land conveyed, 81 C 433
- parol agreements as to land not invalid, but no action lies on them, 81 C 438
- agreement, and modification thereof, to sell real estate proved only by writing, 82 C 293
- where one permits another to make payments for land at other times than those prescribed in the contract and then resells land for nonpayment at prescribed times, a suit against him, for money had and received, is not affected by the statute, 82 C 383
- oral promise to pay for services by making a will, where one has no real estate, is not within the statute, 82 C 648
- an oral agreement to support owner of real estate, in consideration of receiving it on his death, is within the statute, 83 C 34
- agency to sell land and execute memorandum may be by parol, 83 C 120
- express trust of real estate is within statute, 84 C 560
- agreement to buy land jointly and build house thereon and share in the rent is not within the Statute of Frauds, 86 C 453
- agreement to leave boundary line to arbitrators is not an agreement for a sale or transfer of land under statute, 87 C 678
- sale of a building to be removed, not within the statute, 88 C 1, 90 C 289
- surrender and abandonment of land partly paid for, not within the statute, 90 C 555
- statute applies to action for damages on breach of contract by vendee, 91 C 29
- absolute deed given to secure a debt may be read as a mortgage, 91 C 571, 93 C 61, 96 C 212, 97 C 196
- not material whether it is made to secure present debt or future advances, 93 C 61
- agreement to release fourth mortgage when plaintiff redeemed three prior mortgages is within the statute, 92 C 416
- agency to sell real estate may be created by parol, 96 C 84
- executed parol agreement for dividing fence not within statute, 101 C 280
- whether agreement restricting use of real estate creates an interest in land, 106 C 246
- agreement by owner of easement up stairway that showcase might be built across it as within statute, 107 C 662
- agreement to release lots in building development from operation of blanket mortgage as within the statute, 108 C 30
- where property conveyed on agreement of grantee that grantors were to retain possession and have reconveyance upon payment of money loaned and that, if grantee disturbed this possession he would repay them their expenditures, only portion of agreement within statute having been fully performed, action would lie on promise to repay expenditures if they were disturbed, 109 C 522
- agreement to divide profits of real-estate development is not within statute, 113 C 449
- oral agreement in pursuance of which deed is given, may not be proved, 113 C 467
- as where deed was made on oral agreement that on death of grantee property should revert to grantors, 113 C 467
- promise to devise land in return for services is within statute, 115 C 212
- recovery may be had for reasonable value of services on quantum meruit, 115 C 212
- memorandum de purchase of land *held* not to satisfy Statute of Frauds where method of payment of purchase price was not fully stated, 115 C 720
- where law implies resulting trust in land, oral agreement identical in effect does not prevent trust arising, 117 C 58
- oral agreement by grantees to reconvey to grantor if latter reimbursed them for prior loans and expenditures, unenforceable by grantor, 120 C 660
- oral agreement that if plaintiff conveyed one-third interest in property he would be per-

mitted to occupy it for life followed by quitclaim deed of property, not enforceable, 121 C 153

absolute quitclaim deed stated to be upon valuable consideration cannot be converted into a conveyance in trust by proof of oral agreement, 121 C 160

contains no express provision that declarations or creations of trust in land should be proved by some writing, 124 C 140

—but it is part of common law that such trusts may not be proved by parol, 124 C 140

where the absolute title in land is conveyed an oral trust as to it may not be proved unless the case is taken out of the principle as to parol trusts in land, 124 C 148

oral agreement of man and wife that all their property, real and personal, would be community property would be unenforceable, 128 C 636

where agreement alleged was as to all property, but proof was that it applied only to personal property, it was not void because of statute, 128 C 636

§ 7. —Part Performance

part performance takes contract out of statute, and specific performance will be decreed, K 400, 1 R 78, 143, 479, 2 D 225, 5 D 67, 7 C 342, 13 C 478, 14 C 119, 16 C 388, 18 C 222, 26 C 368, 27 C 341, 29 C 429, 35 C 178, 36 C 48, 59 C 117

what acts of part performance are insufficient to take case out of statute, 1 R 59, 19 C 63, 63 C 530

acts relied on as part performance must afford satisfactory evidence of the original contract, 2 R 165

payment, use, and occupation, are acts of part performance, 16 C 388

—also delivery of possession under agreement to lease or sell, 18 C 222

—also delivery under lease itself and payment of rent, 18 C 222

acts of performance *held* admissible before contract is specifically proved, 16 C 402

reason for specifically enforcing a parol contract partially performed, 19 C 74

—facts *held* not to show partial performance of parol contract, 19 C 63

mere payment in part execution is insufficient, 27 C 316

conveyance to one upon his promise to convey to grantor's wife is sufficiently performed by first deed to take case out of statute, 27 C 341

what acts are essential to constitute part performance, 37 C 14, 63 C 109, 530

acts of part performance must unequivocally refer to identical agreement, 37 C 14

character of the acts of part performance which are essential to take case out of the statute, 63 C 120, 539

—mere physical possession insufficient under certain circumstances, 63 C 120

is question of law, 69 C 104

part performance must be consistent with, and inexplicable except under, the alleged agreement, 75 C 1

reservation of mining right as part performance, 77 C 168

power of equity to relax rules; part performance, 80 C 267, 91 C 651

full performance on part of one of contracting parties takes an oral agreement out of statute, 85 C 635

payment of full consideration of land sold does not take it out of the statute if there has been no part performance, such as possession, etc., 88 C 548

equity will enforce oral agreement for sale of land where it has been partly performed, 91 C 651

part performance of oral contract for sale of realty, takes case out of statute, 98 C 315

—acts must be such as can be accounted for only upon theory of a prior contract, 98 C 315

possession and occupation of premises as home without payment of rent or notice to quit *held* sufficient part performance, 98 C 315

where buyer was to pay part of consideration in cash and was to occupy house at \$15 a month till he could spare the money, *held* that occupancy and work on place for three years was part performance, 101 C 219

—completion of contract when buyer could spare money meant in a reasonable time, 101 C 219

—trial court's conclusion reviewable on appeal, 101 C 219

part performance sufficient to remove oral real-estate contract from statute, 101 C 323

—must be conduct reasonably explainable only on basis of contract, 101 C 323

use of uncompleted dwelling for storage of furniture by purchaser with statement by plaintiff that he had bought property *held* to constitute part performance, 101 C 323

—possession need not amount to disseisin, 101 C 328

payments made by adjoining owners to prospective purchaser of lot and others and releases secured as part performance of agreement by owner of lot with them for mutual five-year building restriction, 106 C 243

—basis of doctrine of part performance, 106 C 248

§ 7 Statute of Frauds

quaere whether altering and finishing house to suit wishes of buyer, and removing trees at his request, are such part performance as to take case out of statute, 107 C 181

complete performance of agreement concerning real estate removes it from statute, 107 C 662

building of showcase across stairway as part performance taking agreement out of statute, 107 C 662

doctrine of part performance stated, 108 C 683

—acts sufficient if they refer to some contract as to subject matter in dispute, 108 C 683

—payment alone not sufficient, 108 C 683

—employment of architect and preparation of estimates for improvements, making agreements to resell at a profit and arranging a bank loan insufficient, 108 C 683

taking possession of land under oral contract of sale and building upon it constitutes part performance, 110 C 392

oral contract to buy land not void, only unenforceable, 110 C 395

—hence vendee can subject his interest in land to mechanic's lien where there has been part performance, 110 C 395

rule as to part performance to take case out of statute considered, 112 C 427

—in case of holding over in possession of real estate all circumstances considered, 112 C 427

—presumption that acts done by husband are in interest of wife with whom agreement was made, 112 C 431

—where husband sold land to defendant who orally promised to convey to plaintiff, his wife, order of proof where part performance is claimed, 112 C 430

P conveyed land to L and latter agreed orally to build a house on it and that it should revert to P on L's death; *held* apparent absolute estate cannot be reduced to life estate by oral agreement, 113 C 467

—and making of absolute deed not such part performance as to take agreement out of statute, 113 C 467

to constitute part performance, conduct relied on must be consistent with and referable to oral agreement, 113 C 467

—doctrine permitting absolute deed to be shown by oral evidence to be mortgage is exception to this principle, 113 C 475

power of attorney to convey property not part performance of alleged oral agreement that owner would convey it to attorney, 114 C 539

doctrine of part performance being purely equitable is not recognized in actions at law and is not available in such actions to re-

cover damages for breach of contract within statute, 122 C 507

—remedy in such cases, when specific performance not obtainable, is limited to restoration or restitution, 122 C 507

—court erred in according statute permitting joinder of legal and equitable causes of action the effect of making equitable doctrine of part performance available, though action was one at law, 122 C 507

—so where plaintiff sued for breach of oral agreement by mortgagee to convey property to her after foreclosure in which she would acquiesce as administratrix, and mortgagee refused to convey after getting title, part performance insufficient to take case out of statute, 122 C 507

doctrine engrafted on statute by equity to prevent law designed to prevent fraud from becoming the very instrument by which fraud is accomplished, 124 C 140

acts relied on by party to take case out of statute must be acts done by himself, 124 C 140

—so where one claims to be beneficiary of oral trust as to land conveyed by another to a third person he cannot take advantage of conveyance by grantor as constituting part performance, 124 C 140

mere physical possession not enough to constitute when it is not a new fact but is continuation of former similar condition, 124 C 149

—so where plaintiff continued to reside on farm at expiration of a life estate, claiming that title then came to her under an oral trust, there was nothing in her possession to indicate commencement of new estate essential to take case out of statute, 124 C 140

—and as repairs to farm were not shown to have been made after expiration of life estate, no inference of ownership by plaintiff could arise sufficient to constitute part performance, 124 C 141

where consent was given to foreclosure on promise that property would be reconveyed and mortgagor made extensive improvements in reliance on promise, mortgagee estopped to set up Statute of Frauds, 124 C 507

—in this situation estoppel is co-extensive with doctrine of partial performance, 124 C 515

—may be availed of in action at law for breach of promise, 124 C 515

true basis of doctrine of partial performance is estoppel, 124 C 507

doctrine of part performance has arisen to prevent use of statute to accomplish a fraud, 124 C 514

§ 8. Agreement Not to be Performed within One Year

contract for two years' board executed on one side, *held* not within statute, 1 R 90
 oral agreement to let mill for three years, furnish dye stuffs, etc., *held* within statute, 1 R 549
 oral promise to pay reasonable sum for use and occupation for term of years, *held* not within statute, 2 R 150
 part performance of oral agreement for several years, still executory, takes contract out of statute, 2 R 163
 —but same must afford evidence of original contract, 2 R 165
 if performance may take place within one year, contract *held* not within statute, 12 C 455
 —agreement to labor for one year, 12 C 455
 —but otherwise if services are not to begin at once, 16 C 246
 —contract dates from day when made, not from date of service, 16 C 252
 —a six months' service under same will not validate contract, 16 C 250
 —contract cannot bar recovery on a quantum meruit, 16 C 251
 oral agreement to build store within six months and lease it for three years, *held* not within statute, 18 C 222
 contract of apprenticeship to continue more than one year is within statute, 18 C 341
 mere expectation of nonperformance within a year does not bring case within statute, 20 C 508
 oral contract for labor within statute is no defense to quantum meruit, 25 C 395
 —terms of contract are admissible as tending to prove the amount due, 25 C 188, 395
 oral contract for a partnership to be continued more than one year, is within, 51 C 128
 —but such a contract will be held good for many purposes, 51 C 133
 —even as between the parties, if contract has been wholly or partially performed, 51 C 133
 if no time for performance is stipulated and contract might have been performed at any time, the statute does not apply, 59 C 117
 oral agreement by tenant to fill an icehouse on premises and leave it filled at end of term, more than a year later, is not within statute, 59 C 596
 —contract evidently required the filling to be done within the year, 59 C 596
 contracts which may be performed within one year are not within the statute, 61 C 476
 oral negotiations for contract of employment for one year to commence at a subsequent day are insufficient under the statute, 85 C 421

—but letters written thereafter can prove the terms of the contract, 85 C 421
 —what occurred before they were written is competent to prove their circumstances and to aid in their interpretation, 85 C 421
 agreement to assign all patents is an agreement from year to year and not within the statute, 87 C 75
 agreement for increase of salary per year without limitation is not within statute, 87 C 79
 contract must be impossible of performance within one year to be within that clause of statute, 101 C 54
 —hence contract depending on continuance of life not within statute, 101 C 54
 —such as contract to bequeath in consideration of care until death, 101 C 54
 part performance which will remove from the statute an oral contract not to be performed within a year, 106 C 243
 evidence of acts of part performance must precede evidence of an oral contract, 106 C 243
 statute not applicable to agreement for additional compensation, though work under written contract could not be performed within one year, 121 C 186
 —agreement separate and distinct from original contract, 121 C 186

§ 9. Parol Agreement for Leasing Real Estate

oral agreement to lease for term of years is within statute, 1 R 549, 21 C 398
 oral lease for more than a year *held* within statute, 22 C 403
 terms of agreement *held* admissible as bearing on amount of rent due, 22 C 425, 433, 23 C 56
 status of parol lease within statute, 23 C 304
 substitution of new lessee without written assignment of lease, *held* valid, 26 C 264
 lease for term of years cannot be made basis of action or defense, unless written; memorandum must state length of term, 80 C 263
 oral lease for more than one year not enforceable, 80 C 453, 82 C 413
 —but parties by conforming to it may create tenancy from year to year, 80 C 453, 82 C 413
 agreement for possession of premises and payment of rent until certain controversy is settled, within statute, 80 C 503
 agreement defining terms of existing tenancy within statute, 80 C 504
 oral lease not to be performed within one year from making thereof is void, 86 C 32
 oral lease for two years within statute; not actionable unless sufficient memorandum exists, 92 C 226

§ 9 Statute of Frauds

when written option to renew a lease is necessary, 95 C 454, 460

defectively executed lease for more than one year binding on parties if evidenced by memorandum sufficient to satisfy Statute of Frauds, 102 C 475

claim that oral agreement for reduction of rent in written lease transgressed statute met by fact that reduced rent was paid and accepted, 120 C 568

entry and payment of rent under lease may constitute such part performance as to estop lessor from setting up defense of Statute of Frauds, 128 C 616

—so where plaintiffs claimed injunction ordering defendant to renew lease in accordance with its terms, defendant estopped to set up Statute of Frauds where she failed to execute and record lease as she promised and permitted plaintiffs to occupy premises and pay rent, 128 C 616

agreement to lease premises for term of more than one year is within Statute of Frauds, 128 C 619

sufficient performance of oral alteration of written lease providing that tenant instead of landlord should draw plans and specifications, by fact that tenant drew and landlord approved them, 129 C 682

—but not of modification of requirement in lease that tenant, landlord and mortgagee should sign plans and specifications before lease should be valid, 129 C 682

where lease provided it should not be binding unless plans and specifications to be drawn by landlord were signed by him, tenant and mortgagee, later oral agreements altering this requirement not within exception to statute so as to obviate the signing as provided by lease, 129 C 682

—resort to provisions of lease essential to ascertain consideration for oral agreement and obligations of parties under it, 129 C 682

§ 10. Contract for Sale of Goods or Choses in Action

§ 11. —In General

performance on part of promisee takes case out of statute, 2 R 191, 387

“goods, wares, and merchandise” means personal property of which larceny is possible, 4 C 449

oral agreement for a sale of shares of stock of corporation, *held* within statute, 15 C 400, 50 C 491

—delivery of stock certificates is a sufficient symbolical delivery of shares, 50 C 473

—*held* also a sufficient execution of the oral contract to take case out of statute, 50 C 473

buildings, crops, and earth itself sold to be separated, are personal property, 19 C 165

oral agreement to manufacture and deliver special article, *held* not within statute, 20 C 38

delivery of bill of sale is vendor's execution of contract, 26 C 374

facts *held* to show a sale and not a contract to manufacture, 29 C 508

—criterion as to whether contract is one of sale, or for work and labor, 29 C 512

if part of entire contract is within statute the whole contract is within it, 29 C 509

—to sell certain machines and manufacture others, 29 C 509

—oral contract to deliver at a distance from place of sale does not take case out of statute, 29 C 515

executed contracts de division of personalty, *held* not within statute, 29 C 429

oral agreement that builder should own structure erected on promisor's land, *held* not within statute, 34 C 523

—but a sale after erection must be in writing, 34 C 523

share of stock in corporation is personal property; if valued at \$100 or more, sale comes within the statute, 90 C 342

agreement by one of two owning entire corporation to buy out other as within statute, 100 C 57

oral contract for sale of chose in action worth \$100 or more is within, 100 C 60

agreement on purchase of stock in corporation, by an officer and stockholder in it, to return the price if buyer was dissatisfied and surrendered stock, ordinarily not regarded as in statute concerning sales of goods, 109 C 593

contract to supply and install plumbing fixtures for a single price which includes labor, not within statute, 110 C 234

§ 12. —Acceptance; Receipt; Part Payment

what constitutes acceptance sufficient to take contract out of statute, 13 C 328

goods set apart, and verbal delivery to vendee standing by, *held* sufficient, 17 C 173

—such delivery is not symbolical, 17 C 173

—what delivery of ponderous articles is sufficient, 17 C 173

delivery of a bill of sale is vendor's execution of the contract, 26 C 374

oral contract to deliver at place remote from sale does not take case out of statute, 29 C 515

subsequent tender and acceptance have same effect as delivery made at time of sale, 44 C 133

delivery of stock certificate *held* sufficient delivery of shares, 50 C 473

—also *held* an execution of the oral contract sufficient to take case out of statute, 50 C 473

acceptance by vendee must be an actual receiving on his part of the whole, or part, of the property sold, 60 C 363

—an acceptance may be sufficient to pass title and yet insufficient to remove case from statute, 60 C 363

—facts *held* insufficient to show such an acceptance as would remove case from statute, 60 C 363

acceptance and receipt on sale of goods; burden of proof; meeting of minds in contract and acceptance of goods to be distinguished, 75 C 376, 76 C 229

part payment and acceptance are for the jury, 90 C 193

actual receipt of personal property implies a delivery by seller, 90 C 342

assent by buyer to terms of contract does not satisfy statute; there must be delivery and possession by buyer with intent to vest ownership, 90 C 342

there may be constructive delivery and acceptance of personal property, but proof must be clear, 90 C 343

receipt by defendant of his share of goods bought in common takes case out of statute, 93 C 576

acceptance and actual receipt of part of an order takes case out of the statute, 93 C 639

acceptance of one instalment of goods takes entire contract out of statute, 97 C 485

where defendant agreed to sell fifty shares of stock, found it could deliver only forty-five, directed plaintiff to purchase five in market, and this was done, the acceptance of the five by plaintiff was part performance, 99 C 169

—direction to purchase five was in performance and not formation of contract and created an agency entirely outside contract, 99 C 169

oral contract for sale of interest in corporation; no stock certificates issued, 100 C 57

—taken out of statute by part payment of consideration, 100 C 57

surrender by purchaser of claim against corporation and receipt of money from corporate funds as agreed constituted "giving something in part payment," 100 C 57

receipt and acceptance of substantial part of goods delivered under oral contract satisfies statute, 102 C 626

acceptance of lumber sent under oral extension of written contract *held* sufficient to take oral agreement out of statute, 102 C 627

effect of full performance, 109 C 598

part performance must consist of acts clearly referring to some contract, not necessarily the very contract alleged, 113 C 295

—purchase of stocks by broker on oral order, placed in general account, with unsuccessful attempt of buyer to have bank take

them up and finally payment on account, *held* enforceable, 113 C 295

delivery of shares of stock to broker and effort by him to sell, sufficient part performance to take oral agreement to sell to him out of the statute, 113 C 760

§ 13. Nature and Requisites of Memorandum

advertisement of terms of sale, etc., *held* sufficient as against vendor, K 14

letter explaining purpose of deed *held* sufficient memorandum of contract, 1 R 172

the consideration need not be expressed in writing, 6 C 87, 8 C 10

memorandum must contain subject matter, terms, and names of parties, 10 C 193

—must disclose name of vendor, 10 C 193, 56 C 102

—what description of subject matter is sufficient, 10 C 193

written vote of corporation *held* a sufficient memorandum, 26 C 109

whether deed poll may not constitute sufficient memorandum, *quaere*, 36 C 55, 42 C 254

memorandum signed and dated back by repudiated agent, *held* insufficient, 40 C 452

oral negotiation followed by written offer and answer to proceed, *held* sufficient, 40 C 522

assumption of mortgage debt by grantee, in the deed, is a sufficient writing, 42 C 245

a mere assignment of patent to be used by a partnership orally agreed upon, is not a sufficient memorandum of the latter contract, 51 C 128

signature of auctioneer is a sufficient signing, in a sale of realty, as he acts for both, 56 C 102

—but such memorandum is insufficient if it fails to disclose name of owner or vendor, 56 C 102

—such memorandum ought also to contain a description of the property sold, 56 C 105

sufficient if memorandum be signed by party to be charged by it, both at law and in equity, 58 C 12

—plaintiff may enforce contract against signers though he fail to sign, 58 C 12

memorandum to purchase of A his place in B containing about fifteen acres, *held* sufficiently explicit, 58 C 12

—"place" *held* understood to mean party's place of residence, 58 C 12

facts *held* not to show a sufficient signature by defendant, 63 C 110

general description of the land *held* too indefinite to comply with statute, 63 C 110

—whether such description could be applied to the land intended by extrinsic evidence, *quaere*, 63 C 110

§ 13 Statute of Frauds

record of vote of corporation signed by secretary sufficient, 72 C 58

—presumption that such record was made and signed, 72 C 66

memorandum may be typewritten and signed with rubber stamp, 73 C 341

letter acknowledging that lease is all right, sufficient, 75 C 679

several writings connected by mutual reference may be shown, 76 C 229

memorandum of agreement to lease which makes no reference to length of term, insufficient to satisfy statute; nor can omission be supplied by parol, 80 C 263

sales slip not fixing time of delivery; reasonable time implied, 81 C 572

memorandum may be signed in firm's name if signer had authority, 82 C 293

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—as 1931 act de burden of proof of contributory negligence in death case, 118 C 531

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§ 13. Validating Acts

act validating certain usurious loans applies to such a loan in suit, prior to the judgment, 30 C 149

where a town meeting was not legally warned, *held* proceedings were validated by act, 32 C 47, 37 C 225

repeal of act validating usurious contracts does not affect rights acquired under validating act, 42 C 570

act validating future lists does not repeal act validating past and future tax lists, 44 C 477

when first meeting of school district illegally warned, validating act made legal the meeting and all subsequent proceedings so far as affected by illegality of first meeting, 52 C 45

validating act as to assessment proceedings cures irregularity, not want of jurisdiction, 73 C 360

validating act as curing defect in a deed, 83 C 366, 86 C 282

power to pass validating act as to taxes; retroactive effect, 90 C 312

defective lease not cured by validating act passed before recording; nor by one passed after judgment obtained in summary process, 104 C 291

validating acts constitutional in so far as they cure irregularities of taxing officials, 104 C 579

retroactive legislation should be sustained when effect is to correct mistake, remedy mischief, carry out intention of parties and promote justice, 107 C 698

—but validating act cannot make valid act void in inception because proceeding from total want of power, 107 C 698

—attempt to validate assessment of taxes against lessee, contrary to statute, 107 C 698

Legislature may cure nonobservance of an act it has prescribed, 109 C 307

—as regards deeds, intent is to validate specific irregularity stated and the words “otherwise valid” will be understood if not expressed, 109 C 307

—thus when deed had only one witness and no acknowledgment, it is not validated by acts in terms validating deed with one witness and those without acknowledgment, 109 C 307

statute validating negotiability of mortgage notes containing provision for payment of taxes *held* unconstitutional, 111 C 65

—impairs obligation of pre-existing contract by changing its character, 111 C 65
 validating acts are retrospective, but are not for that reason invalid, 111 C 65
 —nor do they impair obligations of contract but their purpose is to give it validity, 111 C 65
 nature of validating acts; presumed to operate prospectively, 111 C 67
 neither independent re-enactment of acts nor enactments by repetition of the language are necessary, 112 C 129
 validating acts of special session of 1929 *held* to render acts valid from date of the re-enactment, 112 C 129
 —statute de form of bills amending statutes not applicable, 112 C 129
 void act cannot be validated so as to invade right or impair obligation of contract; parties have vested right to compensation as fixed by Workmen's Compensation Act in force at date of injury, 112 C 129
 right of action for negligence cannot be taken away by retrospective validating act; guest statute, 112 C 145
 of special session of 1929 also re-enacted acts in question; they became valid and existing laws after August 6, 1929, 112 C 169
 plaintiff *held* to have waived right to question constitutionality of zoning acts of 1925 or right of Legislature to validate them, 112 C 236
 delay of sewer commissioner to sign tax list for sewer maintenance *held* cured by validating act, 112 C 543
 —any question of validity of that act under McCook decision is obviated where action to restrain collection of tax was not brought till after special session of 1929, 112 C 543
 where tax law authorizing treasurer to collect tax was void as unconstitutional but defect was remedied before action brought, officer directed in it to bring action has authority to do so, 115 C 554
 assessors had authority under validating act to remove property from tax list of A and place it on that of A and his wife, 123 C 543
 act validating deficiencies in notice to city of injury due to defective sidewalk *held* constitutional, 124 C 183
 ordinarily validate acts of municipal corporations only as regards specific defects, 124 C 392
 act validating failure to leave with property owners copies of notices required without effect where irregularities as to time of notice and failure to file copy with town clerk were not mentioned in it, 124 C 392
 special act, applicable to tax sales in West Hartford, *held* to have sufficiently expressed intent to validate the tax sale in question as to defects involved therein, 126 C 206

Legislature may validate retrospectively any proceeding it might have authorized in advance, as well as nonobservance of an act it has prescribed, 126 C 206
 —the "want of authority to act at all" which cannot be cured refers to jurisdictional defect through lack of some essential element in legal taxation; does not extend to mere procedural irregularities, 126 C 207
 —procedural defects arising from want of authority in municipal officer may be cured when Legislature could have conferred requisite authority by prior statute, 126 C 207
 —so inclusion of municipal assessments for benefits in sale for collection of taxes by collector of revenue where charter provided that sales for former should be made by town manager, proper subject for validation, 126 C 207
 that tax liens included personal property did not invalidate them in view of provisions of validating acts that such liens are not invalid because amount of tax secured is wrongly stated, 128 C 551

§ 14. Repeal

all penalties fall on repeal of penal statute, 2 R 183, 249, 30 C 150
 —though given to individuals, and pending suit, 30 C 150
 an affirmative remedial statute does not repeal the common-law remedy, 12 C 528
 repeal by implication exists only where there is irreconcilable repugnancy, 16 C 175
 —later statute must clearly conflict, 37 C 488
 effect of saving clause in repeal statute de penalties incurred, 22 C 170
 statute construed not merely as modification but repeal of former acts de appellate jurisdiction of Superior Court, 22 C 565
 later statute abrogates prior contrary statute, when; both to stand and operate concurrently, if reconcilable, 24 C 589
 repeal pending suit does not affect vested rights, 25 C 16
 act conferring jurisdiction on another court does not per se divest the old court of jurisdiction, 25 C 48
 repeal of statute de manslaughter, without saving clause; accused in pending prosecution escapes, 29 C 275
 substantial re-enactment of former statute and repeal of latter; effect of clause saving estates then in settlement, 31 C 63
 act allowing appeal if judgment exceed five dollars, repeals statute allowing appeal in all cases, 34 C 49
 repeal of criminal statutes before sentence arrests proceedings, 34 C 118
 penalty for larceny; identical statutes; *held* no repeal in part, 34 C 118
 effect of repeal of act de reassessment of land damages; saving clause, 35 C 588

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- act of 1866 de justice appeals, *held* repealed by implication by act of 1868, 37 C 93
- statute denying appeal in actions on officer's receipt, *held* repealed, 41 C 481
- license act of 1872 *held* to repeal act prohibiting sale of liquors, 42 C 55
- repeal of act validating usurious contracts, does not affect rights acquired under validating act, 42 C 570
- special privileges to company at different sessions; general expressions in later act *held* not a repeal of former, 44 C 106
- act validating future lists, does not repeal act validating past and future tax lists, 44 C 477
- defect cured by act to take effect from passage is not affected by later repeal, 44 C 477
- effect of classification of statute by secretary of State, 45 C 358
- repeals by implication are not favored, 55 C 435
- a later statute operates to repeal a former one only so far as they are incompatible, 55 C 435
- if possible they shall be construed so that the new and the old shall stand together, 55 C 435
- repeal of act validating usurious contracts, *held* not to restore a previously existing right to apply excess above certain rate on principal, 56 C 210
- statute de rights unaffected by repeal; statute de repeal of former statutes, 57 C 334
- presumed to act prospectively; if two statutes can be reconciled they have concurrent operation, 62 C 498
- repeals by implication are not favored, 62 C 498
- implied repeal is not presumed, 64 C 71, 82 C 122
- intent must clearly appear, 67 C 208, 265
- repeal of special by general law, 65 C 410, 66 C 271, 67 C 584, 74 C 698
- law applying to all objects of a class repeals law singling out only some of them, 66 C 476
- repeal of statute does not affect actions then pending, 67 C 48
- city ordinance as to fenders on streetcars repealed by general law, 67 C 198, 91 C 234
- new charter covering entire field repeals old, 71 C 104
- intent to repeal must clearly appear, 75 C 442
- see, generally, of implied repeal, 75 C 442, 86 C 176, 94 C 228
- repeal will not affect pending actions unless that intent clearly appears, 75 C 447, 78 C 426, 86 C 425
- special and local laws not affected by general laws unless intent appears, 82 C 122
- repeal by implication not favored nor presumed if old and new statutes can stand together, 82 C 122
- repeal not extended beyond the reason therefor, 85 C 517
- act expressly repealing inconsistent acts or parts of acts adds nothing to what is implied; such repeals are not favored, 85 C 517
- a general statute allowing towns to condemn land does not repeal, by implication, same power in a charter, 86 C 151
- therefore, repeal of general law *held* not to affect charter, 86 C 151
- repeal of special law by general statute not favored; intent must appear expressly or by clear implication, 86 C 178
- general statute, providing that the passage or repeal of an act shall not affect pending action, does not apply where Legislature declares intent to have the same effective at once, 86 C 425
- later ordinance or statute, to repeal an earlier one, must cover whole subject matter and must plainly show it was intended as a substitute for the old; repeal by implication not favored, 88 C 528
- charter provision is repealed by general law restricting ordinances as to operation of motor vehicles, 91 C 234
- of two antagonistic statutes, the later one expresses final legislative intent, 92 C 516
- re-enactment of portions of existing statutes, in a substituting statute, repeals provisions of former act that are omitted, 92 C 568
- special act concerning layout of sidewalks and curbs, without provision for assessing damages for change of grade, does not repeal general statute on this matter, 94 C 149
- repeal by implication occurs only where statute is so repugnant as to show that later was intended as a substitute for earlier one, 94 C 228
- repeal and re-enactment in amended form of law governing giving of bonds by private bankers *held* not to discharge bonds in force, 95 C 10
- provision in city charter "notwithstanding any general statute to the contrary" means any then existing; a later general statute may alter it, 95 C 600
- to what extent prior statutes de school districts are repealed by compulsory Town Management Act, 103 C 418
- later statute covering whole subject repeals earlier by implication, when repugnancy exists, or when latter interferes with practical operation of former, 104 C 238
- statute reorganized entire tax system of Bridgeport and fixed salaries of officials; *held* to repeal by implication any power previously possessed by city to change salaries of those officials, 104 C 238
- implied repeal of charter provision by general statute when clear inconsistency or re-

- pugnancy of legislative intent exists, 107 C 596
- where one charter provision provided for review of a tax rate for maintaining sewers in a town meeting to which its regular tax rates were submitted, and law providing for submission of town tax was repealed, this impliedly repealed requirement of submission of sewer tax, 112 C 553
- earlier and later statutes should be reconciled where possible to avoid implied repeal, 113 C 377
- statute de duty of county commissioners to furnish courthouse *held* not repealed by 1929 act de terms and sessions of court, 113 C 377
- repeal by implication not favored, 114 C 400
- occurs only when two statutes are so repugnant as to indicate later act intended as substitute for former, 114 C 400
- if both can be reconciled they must be given concurrent operation, 114 C 400
- presumption against repeal by implication greater where both provisions are retained in general revision of statutes, 114 C 400
- statute giving ambulance right of way *held* not repealed by later statute de traffic lights and signals, 114 C 400
- ordinance requiring certificate of lien for assessment to be filed within three months repealed by charter provision requiring it to be filed within one year, 115 C 519
- where there are two conflicting sections of a general compilation, that section should prevail which is last expression of law-making power in enacting separate statutes upon same subject, 116 C 119
- two statutes are to be regarded as repugnant only when both cannot reasonably be given effect, 116 C 119
- general provision that reference of award of damages in condemnations by State should be referred to state referee repealed inconsistent provision in prior statute de park and forest commission, 116 C 119
- though latter statute was included in Revision of 1930, 116 C 119
- repeal of statute concerning recording conditional sales does not affect sale made before repeal took effect though recorded thereafter, 116 C 364
- otherwise effect would be to give repeal retroactive effect, 116 C 364
- repeal of statute making owner of automobile liable for injury resulting from incompetence of driver to whom he has loaned it *held* not in derogation of adoption of common-law rule on this subject, 116 C 515
- when later statute is exclusive it will be held to repeal by implication all prior statutes on the matter, whether they are general or special, 118 C 199
- repeals by implication not favored and legislative intent must be plain, and if two laws can be reconciled both must stand, 118 C 199
- implied repeal of general law by subsequent private act not favored, will not be assumed, and will not take place unless there is a manifest repugnancy, 120 C 348, 567
- held* no repugnancy between special act of 1929 de consolidation in Hartford and Cum. Sup. 1933, § 257b, de equalization, and they may stand and operate together, 120 C 348
- defendant sentenced to be hanged but before execution statutes were passed providing that execution should be by electrocution; *held*
- that §§ 6561 and 6568 (Rev. 1930) in effect attach to every act repealing a statute a saving clause as regards matter covered by repealed statute, 121 C 195
- that the acts providing a new method of execution constitute a “repeal” of the previous law, and the situation comes within the purview of §§ 6561 and 6568, 121 C 195
- and the judgment directing the hanging is effective, 121 C 196
- history of relevant statutes reviewed, 121 C 195
- where new provision is to be substituted for existing one, whether the new takes form of direct enactment with repeal of the old, or of an amendment substituting new for old, is immaterial, 121 C 200
- general law providing for condemnation of lands for water supply on application to Superior Court, enacted before special law giving right to particular company but reenacted in revision after special law, did not repeal such law, 124 C 438
- whether or not rule against retrospective construction applies fully to acts repealing prior statutes, without a saving clause, such repeal does not operate to impair rights that have vested, 125 C 145
- rule applicable not only to rights acquired under contracts but also to vested rights of action in tort, 125 C 147
- when statute is passed limiting common-law rights, repeal of statute after right of action has accrued will not affect its application, 125 C 145
- so where plaintiff injured while riding as guest before repeal of guest statute but action not brought until after its repeal, no right of action for negligence, 125 C 145
- 1935 act re Merritt Parkway *held* not to repeal by implication previous legislation making it a trunk line highway, 125 C 406
- such repeals not favored, 125 C 417
- statute providing for annual town audit did not repeal special act de inspection, 126 C 542

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earlier statute impliedly repealed by later one only if latter is necessarily repugnant to former, 126 C 588

appeal section in Minor Court Act is exclusive and provisions are repugnant to charter provisions de appeal and repeals them, 126 C 588

repeal of Statute against Perpetuities did not have effect of validating provisions in wills of testators who died before repeal which were void under its terms, 127 C 1

where latest statute governs whole subject to which it relates, it repeals by implication prior statutes on the matter, whether general or special, 129 C 329

—so amendment to charter of Hartford concerning firemen's relief fund, passed as special law in 1921, covered whole subject and superseded special law of 1911, 129 C 329

§ 15. Revisions

meaning and legal effect given to revised statutes, 20 C 8

lawful revision is conclusively presumed to contain all public statutes, 20 C 8

revisions are presumed not to change the law, 49 C 235

mere change in words of revision will not be deemed a change in the law unless such intention appears; what change will import such intention, 62 C 319

revision presumed not to change law, though words might admit of that construction, 67 C 592, 68 C 423, 69 C 452, 71 C 517, 529; 76 C 288, 77 C 35, 80 C 584, 84 C 370, 86 C 61, 90 C 332, 92 C 524

duty of revisers, 72 C 687

revisers of the statutes are presumed not to change the law, 84 C 371

—principle applied to extradition statute, 84 C 370

general revision contains entire statute law regardless of when particular statute went into effect, 84 C 470

—Indeterminate Sentence Act and statute fixing minimum penalty of ten years, 84 C 470

intent to change the law by revision must clearly appear, 86 C 61, 90 C 327

comma inserted in revision, disregarded, 93 C 513

revisers are presumed not to change the law, 99 C 343, 100 C 407, 108 C 487, 110 C 501
presumption that revisers intended to preserve intent of existing statutes, 114 C 305

—this yields to clear intent to do otherwise, 114 C 306

revisers presumed not to change law if language fairly permits construction not doing so, 115 C 393

—principle particularly applicable to the revision of 1875, 115 C 401

where two sections of revision conflict, that should prevail which is derived from last expression of lawmaking power, 116 C 119

—as where statute provided that condemnation proceedings by state park commission should be held before appraisers and later statute provided that all proceedings in condemnation brought by State should be heard by state referee, 116 C 119

—where two provisions in general revision conflict, probable that repugnancy was overlooked, 116 C 119

change in language made in revision of 1875 *held* merely to intend more concise statement and not to change law, 118 C 384

when two provisions of revision conflict, last expression of legislative intent should control, 119 C 507

where in revision of statute omission of vital enabling provision evinces intent to terminate right, retention of incidental provisions which might apply to right will be disregarded, 122 C 45

method of preparation of Revision of 1821 considered, 124 C 166

history of original Revision of 1784, 124 C 456

while mere change in words of revision will not effect change in law, where intent to do so is evident it cannot be disregarded, 125 C 313

—where provision excluding industrial banks from statute exempting banks and trust companies from usury laws was intentionally omitted in Revision of 1930 and was expressly repealed when the revision was adopted, *held* such banks not thereafter subject to usury laws, 125 C 314

STAY OF PROCEEDINGS

See APPEAL TO THE SUPREME COURT § 16; EXECUTION § 9;
JUDGMENTS § 22; TRIAL § 5

STOCKBROKERS

See BROKERS § 5; PLEDGE

STOPPAGE IN TRANSIT

See CARRIERS § 4; SALES § 11

STORES

See NEGLIGENCE § 5(4); HIGHWAYS § 16

STORM

See ACT OF GOD

STREAMS

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STREET RAILWAYS

§ 1. IN GENERAL

2. CHARTER AND FRANCHISE; POWERS GENERALLY
3. LOCATION AND CONSTRUCTION
4. MAINTENANCE AND OPERATION
5. MORTGAGES; LEASES; RECEIVERSHIPS
6. LIABILITY FOR INJURIES DUE TO DEFECTS IN HIGHWAY
7. LIABILITY FOR INJURIES DUE TO NEGLIGENT OPERATION
8. —In General
9. —Speed and Control; Signals; Lights; Equipment
10. —Stopping Places; Persons Getting On and Off
11. —Accidents at Intersections
12. —Contributory Negligence; Last Clear Chance
13. ACTIONS; NOTICE; PLEADING; EVIDENCE

NOTE: Cases involving liability of street railway to passengers are listed under CARRIERS § 10

See also AUTOMOBILE § 19; CHARGE TO JURY § 21; HIGHWAYS § 15;
MASTER AND SERVANT; PUBLIC UTILITIES COMMISSION; RAILROADS;
RAILROAD COMMISSIONERS

§ 1. In General

horse railroad is not within general railroad law of 1849, 32 C 581
conduct *held* to estop company from claiming as a defense to assessment that charter required it to pave its line at its own expense, 38 C 422
rails, ties, sleepers and spikes of company attached to the soil, are liable to assessment for benefits and damages, 38 C 422
authorized crossing of railroad is *damnum absque injuria*, 65 C 410, 70 C 610
exaction of reasonable compensation by city from street railway as an additional burden not exercise of taxing power, 67 C 198
where powers of municipality and street railway conflict, former prevail, 67 C 219

mechanic's lien against, 78 C 291
right to enforce rule for expulsion of passengers not tendering fare or proper transfer, though transfer is wrong through fault of another conductor, 79 C 109
whether statutes as to railroads apply is to be determined by examination of whole body of law, 80 C 40
liability of one company for injury after it has turned its car over to a connecting line under agreement for division of receipts, 80 C 561
railroad commissioners are agents of State in controlling wires of street railway in highway; their powers, 80 C 623
passenger in streetcar as a traveler on highway, 82 C 2

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no mechanic's lien against a railroad, if material was furnished to a subcontractor, unless railroad approved of it, 83 C 82

lien for work and material; contract must be with or approved by railroad; filing certificate with secretary of state is sufficient; allegation as to approval in foreclosure proceedings, 83 C 82

"express cars" are those not stopping at call but at stated points, 84 C 456

street railway having an amusement park must exercise same care as anyone else in making it safe, 84 C 538

power of utilities commission and of courts on appeal to fix reasonable rates, 91 C 692

—what considerations enter and what is discrimination, 91 C 692

history of ownership and control of street railways in Connecticut by New York, New Haven and Hartford Railroad to 1920, 94 C 14

an agreement to impart valuable information, which will be profitable, is not fulfilled by suggesting selling advertising space, 95 C 702

where tracks of street railway are laid in the highway, it may petition for elimination of grade crossing, 100 C 326

plaintiffs who had occupied supervisory positions and been demoted to motormen, sought to enjoin rule stating that motormen advanced to official position will not advance in seniority rating while occupying such position, 119 C 622

—but since they were represented in proceedings in which rule was adopted and continued employment knowing of it they were bound by it, 119 C 622

—nor did a few violations of the rule establish consistent practice amounting to practical construction by parties, 119 C 622

—and plaintiffs could not claim estoppel as they were not misled by failure of company to apply rule in some cases, nor induced to act differently, 119 C 622

—agreement between employees' committee and company establishing rule not unfair or illegal nor did it subject plaintiffs to tyranny of others, 119 C 622

§ 2. Charter and Franchise; Powers Generally

charter provided that company could use electricity "in any mode that does not involve the use of overhead wires"; *held* company could not use overhead wires, 61 C 127

—even with the permission of the mayor and common council of the city under statute, 61 C 127

—and *held* that charter was the full measure of the power of the company, 61 C 127

—and the exception to the use of overhead wires was equivalent to a positive prohibition, 61 C 127

special charter not repealed by general law unless intent necessarily appears, 65 C 410

general law prohibiting certain grade crossings *held* not to repeal charter right to cross railroad at grade, 65 C 410

charter purporting to take property without compensation, or provision for condemnation, invalid, 69 C 155

franchise to build and operate, granted to persons by name, with discretion in them, cannot be bargained away, 73 C 513

under power to amend charter, reasonable conditions as to use of property may be imposed, 75 C 442

construction of charter authorizing railway to take land in same manner as steam road, 80 C 37

—deposit for each mile built not required; failure to agree for purchase, 80 C 37

—proceedings for appointment of appraisers informal, 80 C 37

legislative grant to railroad is qualified by grant to city, 81 C 645

railroad is obliged by law to obey city's order; right to use streets not absolute, 81 C 645

may so disregard the rights of abutters that liability will follow, but injury from dust, noise, etc., is inevitable and not per se actionable, 84 C 450

can run construction cars and haul home disabled cars, 84 C 450

street railway is not necessarily an additional servitude on highway; it depends on facts of each case, 85 C 401

—controlling fact is, does it burden highway in furtherance of regular highway use or in an essentially different and independent way, 85 C 401

street railway, operated in excess of or without legal authority, is a trespasser on abutting owner's fee in highway, 85 C 401

where charter provided that extension of lines could only be constructed with consent of city, right of city to annex conditions, 107 C 312

—requirement that company pay percentage of gross earnings upheld, 107 C 312

—construed to be intended only as compensation for construction of future lines, compensation for use of streets and burden of tracks, etc., 107 C 312

—estimate of fair compensation is for parties and courts will not interfere, 107 C 312

—payments *held* not a tax, 107 C 312

—provision for them not strictly ultra vires and by long enjoyment of possession company estopped to question it, 107 C 312

—city entitled to accounting of receipts, 107 C 312

—grant of permission and acceptance by company gave rise to vested rights, 107 C 321

—whether statute granted right to construct or delegated power to city, franchise came from State, 107 C 321

§ 3. Location and Construction

See also RAILROADS § 3

the laying of a horse railroad is not a new servitude on highway, 32 C 579

—is a public use to which land was originally liable, 32 C 579

confined to streets specified in charter, 56 C 381

—right to lay tracks “over or across” intersecting streets does not add such streets to those specified, 56 C 381

authorized crossing of railroad by street railway not ordinarily basis for damages, 65 C 410, 70 C 610

locating in highway as entitling owner of fee to compensation; injunction against unauthorized construction; trespass, 67 C 197, 69 C 146, 84 C 45

location once made cannot be changed, 67 C 220

statute as to extension of track parallel to steam railroad; applicable to amendment to charter passed after statute went into effect, 67 C 261

—right of railroad to injunction where construction not authorized; departure from authorized route, 69 C 47

—what constitutes public necessity and convenience; financial ability of applicant to be considered; appeal as to, 69 C 626

—rulings on evidence not exceeding jurisdiction or violating essential principles of judicial proceedings not erroneous, 69 C 626

—jurisdiction of court to make finding as to necessity and convenience depends on existence of power to build; charter limits this power, 72 C 33

—power to construct through street to convenient connection with another railway; abandonment of other railway; railroad should be party to proceedings, 72 C 33

right in structures and track in street, 69 C 155

power of Legislature to impose duties as to oversight of construction upon courts, 69 C 576

nature of appeal to Superior Court or judge in matters of location and construction, 69 C 600, 73 C 327, 78 C 222, 80 C 623

to pay compensation where its operation constitutes appropriation of land of adjoining proprietor, 70 C 610

municipality has power to order removal of tracks and structures not located according to approved plan, 73 C 327

—copy of order mailed to railway company sufficient compliance with statute de giving notice, 73 C 327

appeal lies from refusal of city to permit laying of certain kind of paving, 75 C 471

city council may order removal of track not laid as authorized; minor departures; remedy of city; mandamus, 76 C 174

—crossover switch at unauthorized point, 74 C 194, 76 C 174

commissioners’ order to carry highway over railroad tracks upon a bridge not a mere change of grade; is elimination of nuisance and only railroad commissioners could determine portion of expense street railway occupying highway with its tracks should pay, 77 C 494

on approval of layout, municipality can impose conditions, 78 C 222, 81 C 645

—they must be reasonable; whether valid or not a judicial question; condition may be invalid without affecting approval; certain conditions considered, 74 C 102

—statutory width of street must not be narrowed; appeals; jurisdiction of Superior Court, 67 C 197

appeal by street railway from decision of municipal authorities de location carries whole proceeding for review de novo by railroad commissioners, 78 C 222

history of legislation as to construction, 80 C 632

appeal from order of railroad commissioners as to approval of layout and taking of land, 81 C 16

—no distinction, whether proceedings are under general or special law, 81 C 16

what constitutes “location”; where charter limits are indefinite; necessity of adoption by directors of location submitted for approval; what constitutes such adoption, 81 C 16, 83 C 603

in appeal from railroad commissioners there is no difference between one based on general right to condemn and one on special power granted in charter, 81 C 16

the location of a railroad is the definite and final one selected by its directors and must be within limits set by its charter, 81 C 16

an appeal by landowner from order of railroad commissioners approving a location, acts as a supersedeas and is ground for dismissal of further proceedings by railroad for taking the same land, 81 C 16

power to locate is a matter of election, 81 C 645

right to locate is exhausted when once exercised, 81 C 645

acceptance of plan by city does not compel road to build; if it starts, however, it must

§ 3 Street Railways

complete it; mandamus will issue to compel it, 81 C 645

city may modify plans as to grade; can compel widening and grading of highway; can fix time of completion and operation, 81 C 645

assumes obligations of company it succeeds to complete and operate the road; failure of former company no excuse, 81 C 645

necessity of approval by city extends to the entire plan, 81 C 650

in 1905 railway laid out and built road over one tenth of a lot without approval or condemnation; in 1907 railway laid its route out over twenty-two hundredths of the lot and claimed commissioners' approval of this was an approval of its former act; *held* not to be so, 83 C 603

—approval of a greater amount is not approval of lesser, as company itself had regarded latter as insufficient, 83 C 603

charter permitting street railway to build on property near a route mentioned; *held*, location on private property two hundred and fifty feet from highway was authorized, 83 C 604

abutting owner may appeal from unreasonable, unauthorized and irregular action of railroad commissioners, 84 C 25

directors of a company must pass on the plans before railroad commissioners can do so, 84 C 25

question of damages is a judicial one, and a general allegation of such is sufficient on appeal, 84 C 25

essential allegation in application to railroad commissioners for a layout, 84 C 40

railroad must first get right to locate on land before asking commission to approve, 84 C 40

landowner has right to show that location will injure him, 84 C 40

public's rights must be protected by commissioners and no greater injury done the landowner than is necessary, 84 C 40

on appeal from railroad commissioners, Superior Court does not try case de novo; appellant has burden of proof; pleadings before commissioners are informal, 86 C 36

the fact that railroad has entered land without authority and that suits are pending against it therefor, does not prevent condemnation proceedings, 86 C 37

while directors should vote to make the alterations, failure to allege such vote *held* not fatal, 86 C 37

—unnecessary to attempt to obtain land by agreement or condemnation before asking approval, 86 C 37

railroad commissioners' acts rest on public convenience; Legislature can delegate to them such matters as determining number of tracks, etc., 89 C 528

order requiring relocation of tracks is exercise of police power, 95 C 26

—valid if it is in the interest of safety, morals or health and reasonable, 95 C 26

—this question is finally one for the courts, 95 C 26

—order requiring large expenditure *held* confiscatory, 95 C 26

in determining relocation of tracks, public utilities commission acts in administrative capacity, 95 C 26

—on appeal, court reaches its conclusion without regard to expediency or wisdom of committee's act and without substituting its own judgment as to reasonableness for that of commission, 95 C 26

power of public utilities commission over construction, 103 C 205

§ 4. Maintenance and Operation

street railway company required by charter to repair part of street, failed to do so, and was assessed by borough for benefits to "land and buildings" on account of such repairs, 61 C 76

—*held* question was whether company had received benefits to land and buildings so as to be liable, 61 C 76

—the legal liability of company to borough for money expended for it by latter does not enter into the case, 61 C 76

—question to be determined by borough charter rather than by charter of company, 61 C 76

—and *held* franchise of company was not covered by "land and buildings," 61 C 76

—whether right of company to lay tracks in streets is "land and buildings," *quaere*, 61 C 76

selectmen not authorized to trim trees without owner's consent to make way for wires, 66 C 568

statute gives railroad commissioners exclusive jurisdiction in respect to fenders and repeals all inconsistent provisions of municipal charters and ordinances, 67 C 198

can use same poles as telephone company, 70 C 54

control of use of wires in street by, 71 C 381, 657, 80 C 623

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STREETS

See HIGHWAYS

STRIKES

See CONSPIRACY; LABOR UNIONS

SUBPOENA

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SUBPOENA DUCES TECUM

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SUBROGATION

§ 1. IN GENERAL 2. PARTICULAR CASES

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§ 1. In General

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- designed only for use of public bodies, 123 C 232
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- judgment creditor suing insurer stands in shoes of insured and any defense which would be good against latter is good against former, 127 C 692
- this applies to defenses of waiver and estoppel, 127 C 692
- ### § 2. Particular Cases
- officer attaching goods subject to lien for freight by paying the freight is subrogated to rights of carrier, 16 C 71
- if one tenant in common of equity of redemption is compelled to pay off whole incumbrance, he is subrogated to rights of first mortgagee and can call upon cotenant to pay him his share or be foreclosed of his right to redeem, 17 C 394
- payment of mortgage debt by R put him in place of mortgagee, 46 C 207
- where K purchased J's interest in blackacre and paid note and mortgage to bank, he had all rights of bank, unaffected by later conveyances, except as he was owner of only part of equity, creating case for apportionment, 51 C 329
- payment of loss on fire policies to pledgee of insured to secure claim of latter, *held* a payment of policies, 57 C 68
- does not subrogate insurance company to claim of pledgee, 57 C 68
- railroad liable for fire, under statute, cannot secure benefit of insurance in favor of plaintiff on property burned, 60 C 128
- no privity in such case between railroad company and insurance company, 60 C 131
- railroad company setting fire is itself primarily liable for loss and cannot have benefit of owner's insurance, 60 C 142
- where land subject to valid attachment is sold by trustee in insolvency, 74 C 616
- where trustee, in breach of duty, gives fund to ultimate beneficiary, 77 C 81
- sureties of defaulting treasurer of savings bank are not entitled to subrogation, 81 C 261
- purchaser of supposedly good title, who furnished money to remove a mortgage, is subrogated to rights of mortgagee, 81 C 547
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- right of mortgagor who conveys equity, then pays note, to be subrogated to security, 93 C 498
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- surety *held* liable to creditors and distributees of estate, 97 C 640
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- where surety on attachment bond paid judgment on note in suit on account of his principal, the payee and indorser, he was subrogated to principal's right against makers of the note, 101 C 736
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- grantor, retaining part of mortgaged premises and paying mortgage, assumed by grantee before expiration of extended time granted latter without grantor's knowledge or consent, was not volunteer precluded from recovering from grantee, 106 C 339
- statute subrogating judgment creditor to rights of assured under policy against accident liability; purpose; leaves to company same defenses available to it against assured, 107 C 649
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- garnishment not prosecuted to effect does not change status, 115 C 193
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§ 2 Subrogation

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loan corporation which refinanced property owner, taking new first mortgage and giving bonds and some cash for release of existing mortgages, subrogated to rights of released mortgages where attachment lien of which it was ignorant because of mistake of title searcher became first lien by reason of transaction, 123 C 232

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—claim that subrogation is allowed only where person seeking it is either under obligation to discharge debt or where there is agreement that he shall have benefit of the security, not sustained, 123 C 233

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—and intent of all the parties to refinancing transaction not defeated because loan corporation acted in disregard of lien, of

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SUNDAY AND SUNDAY LAWS

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Sunday and Sunday Laws

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SUPERIOR COURT

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- 2. JURISDICTION AND POWERS
- 3. —In General
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- 5. —Particular Cases
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INTOXICATING LIQUOR § 7; JUDGES; JUDGMENTS; JURIS-
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Superior Court ordinarily has no jurisdiction over life tenant to protect remainderman of personalty, 60 C 542

—especially where the bond given by the trustee is good and sufficient, 60 C 542

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§ 3 Superior Court

right to appoint receivers vested in court, 111 C 605

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judges of Superior Court have authority to make rules de extraordinary proceedings, including mandamus, 115 C 101

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—may authorize receivers to borrow money, including receivers of banks and trust companies, 115 C 530

act establishing Juvenile Court provides that it shall have “exclusive original jurisdiction” of delinquent child; *held* that until that court has acted Superior Court has no jurisdiction, 115 C 589

—whether Superior Court could act in any event not decided, 115 C 589

—Superior Court or Court of Common Pleas acting upon information of prosecuting officer exercises original jurisdiction, 115 C 599

court has plenary jurisdiction, both legal and equitable, 117 C 451

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court has no right to take over settlement of an estate, 117 C 572

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Superior Court cannot exercise a primary jurisdiction which by statute is reposed in Court of Probate, 124 C 111

—it can settle an account on appeal from doings of Probate Court and then only so far as it can without exercising a power vested exclusively in Probate Court, 124 C 111

as court of equity, has power to carry out general intent of donor of charitable trust, though particular form or manner indicated by testator cannot, because of changed conditions, be followed, 124 C 492

beyond power of Superior Court to assume primary jurisdiction to render judgments which would bring about administration of property in this State, 127 C 108

at least as regards admission of wills to probate, Superior Court has all the powers of a Probate Court, 129 C 315

§ 4. —Matter in Demand

“matter in demand” is shown by ad damnum clause unless declaration shows less can be collected, 3 C 553, 4 C 257

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court has jurisdiction over claim based on nine notes of \$400 each, for entire price, 54 C 86

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practice of bringing cases to Superior Court which belong in Common Pleas Court criticized, 111 C 666

where largest sum due plaintiff under allegations was \$475 liquidated damages, and interest negligible, *held* Superior Court had no jurisdiction, 118 C 26

as regards a separate action to enforce liability of an individual stockholder, amount in demand would be amount claimed due from him, 121 C 220

—same limitations of jurisdiction apply as regards power of court to give a several judgment against several defendants in single action, 121 C 220

—so plea to jurisdiction of defendant against whom damages of \$200 were sought, properly sustained, 121 C 220

§ 5. —Particular Cases

where both parties nonresidents, and defendant not found within State, attachment before receipt of process *held* not to give Superior Court jurisdiction, 43 C 183

bill to set aside contract changing mode of distribution is within jurisdiction, 44 C 331

whether upon quo warranto, or finding that relator had a majority of votes, court could establish his title to office of governor by a judgment, in absence of declaration by General Assembly under Article IV, § 2, Constitution of Connecticut, and in utter collapse of the legislative department, *quaere*, 61 C 372

—a trial under such circumstances is not an infringement upon the powers of the

co-ordinate branches of government, 61 C 374

a charter provision giving court power to repeal any by-laws of a borough unreasonable or contrary to state laws or United States Constitution, *held* not to confer power to amend or modify, 62 C 114

—a by-law which burgesses had no power under charter to make is contrary to the laws of this State, 62 C 115

Court of Common Pleas enjoined receiver appointed by Superior Court; *held* it had not clearly exceeded its jurisdiction, 68 C 543

action to compel conveyance of patent, and for \$5000 damages for refusal to convey, in jurisdiction of Superior Court, though purchase price of patent is \$300, 69 C 440

—oral waiver of damages after default, of no consequence, 69 C 440

statute giving appeal to Superior Court empowers court to direct railroad commissioners to exercise their equitable powers, 78 C 226

statute giving Superior Court jurisdiction on appeal from railroad commissioners over elimination of grade crossings is to that extent void, 78 C 301

equitable apportionment of costs between city and railroad for repair of highway bridge may be referred to courts by Legislature or to executive officers, 88 C 471

Chapter 205, Acts of 1919, permitting Superior Court to pass on alteration, relocation or abandonment of highway that power company intends to submerge does not unlawfully enlarge court's jurisdiction, 95 C 88

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age of minor under Juvenile Court Act, 100 C 497

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procedure for removal of public utilities commission; duty of court merely to find facts, 111 C 634

Superior Court *held* to have power to authorize receiver of bank to borrow from Reconstruction Corporation for purpose of paying dividend to depositors in savings department, 115 C 530

where certified copy of order of removal from District Court of Waterbury to Superior Court was not served on adverse parties, latter court did not acquire jurisdiction, 117 C 39

so long as decree of Probate Court admitting will remains in effect, there is no right to original action in Superior Court for mis-

appropriation of funds, etc., by executor, 117 C 565

action by receiver of nonresident joint stock land bank joining as defendants stockholders residing in different counties, 121 C 220

reorganization proceedings in federal court under Bankruptcy Act did not oust Superior Court of jurisdiction to vacate its foreclosure judgment and allow withdrawal of action, 123 C 9

statute providing that recovery on penal bond shall be only such sums as are equitably due and not for whole penalty, construed, 124 C 111

—as applied to action on executor's bond does not mean that Superior Court may determine what expenditures have been justifiably made, 124 C 111

to be available to executor in suit on probate bond, credits for payments made creditors, legatees and for administration expenses must have been authenticated by Probate Court through settlement there of executor's account or on appeal from action of that court, 124 C 112

—it is within power of Superior Court in exercise of discretion to continue case until executor has opportunity to obtain such a settlement of account, 124 C 112

§ 6. Terms and Sessions

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—to hold court in another town than that stated in statute, 113 C 377

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statute de duty of county commissioners to furnish courthouse *held* not repealed by 1929 act de terms and sessions of court, 113 C 377

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§ 7 Superior Court

§ 7. Appeals to

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—execution may issue at any time though case be not formally remanded, 21 C 530
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Superior Court, on probate appeals, sits as Probate Court and tries case de novo, 39 C 401

—not confined to facts found by Probate Court, as basis for its decree, 39 C 401

allegation of want of jurisdiction in Superior Court, in appeal from probate, is not a ground of appeal, 43 C 113

—such allegation is not a plea to the jurisdiction, 43 C 114

—to be regarded as suggestion *amici curiae*, and to be favorably received, on appeal from doings of commissioners, 43 C 114

—if true, case must be dismissed, 43 C 119

—such dismissal is a perpetual suspension of proceedings in Probate Court, 43 C 120

Superior Court on appeal from Probate Court can exercise no equity powers that Probate Court could not, 53 C 35, 62 C 223, 84 C 560

—Practice Act does not enlarge equity powers of Superior Court, 53 C 35

in appeal de application for altering school districts under statute, court is not limited to reviewing action of town, 55 C 246

—can allow application in whole or in part, 55 C 246

where the appeal is void, the court cannot acquire jurisdiction by parties' consent, 61 C 380

—otherwise if voidable, 61 C 381

appeal lies from action of board of relief of Bridgeport, under statute, 62 C 440

if court has no jurisdiction of an attempted appeal it should be at once dismissed, 71 C 270

appeal from commission appointed under special act to value real estate, 73 C 646

whether condition imposed on street railway by municipality is lawful is a judicial question determinable by Superior Court on appeal, 74 C 102

on appeal from selectmen's abandonment of highway, action before selectmen need not be considered, 83 C 101

taking of a bond and allowing appeal is a clerical act, 84 C 460

on appeal to Superior Court from administrative board, all jurisdictional facts must be alleged and proved, 85 C 517, 88 C 472

—right of judicial officer to interfere with acts of administrative board, 85 C 517, 88 C 472

on appeal from public utilities commission not only legality, but expediency and propriety of order, is re-examined, 88 C 472

one who earns a living gathering oysters on natural beds is a person who can appeal from a designation of private grounds, 89 C 7

"appeal" and "application for relief" usually equivalent, 92 C 206

function of court in reviewing action of examining board in revoking license to practice medicine, 103 C 66

—court inquires whether board has acted illegally or exceeded its authority, 103 C 66

—but this involves finding of existing facts, as fraud in procuring license, 103 C 87

upon appeal from board of relief, Superior Court performs double functions, partly judicial and partly administrative, 103 C 149

Probate or Superior Court, on appeal, ordinarily has no jurisdiction to pass on validity of claims, but may do so in certain instances as incidental to discharge of powers expressly granted, 103 C 226

statute permitting transfer of appeals to another county passed and then repealed at same session; an appeal transferred while first act in force *held* not affected by second, 108 C 74

action of a removing official is final if he has complied with limitations on his power of removal, 114 C 290

—sufficiency of cause is for him to decide, though it must be reasonable, 114 C 290

appeal from action of zoning board of appeals in granting license to sell gasoline, improperly taken to Court of Common Pleas, and appeal properly stricken from docket, 116 C 553

—proceeding was one under gasoline statutes not zoning regulations, 116 C 553

—particular provisions in gasoline statutes constitute exception to general provisions in zoning laws de appeal to either court, 116 C 553

Superior Court in acting upon appeal is itself acting as Court of Probate, with the same powers and limitations, 120 C 406

—it is not exercising judicial powers vested in it by Constitution, but a special limited jurisdiction conferred by statute, 120 C 406

—unless conditions which statutes designate as essential for appeal are met, court is without jurisdiction, 120 C 406

where Probate Court has refused to allow account as whole, on appeal Superior Court may, so far as it may without exercising

- power vested exclusively in Probate Court, settle the account, 122 C 64
- but it cannot exercise discretion vested in Probate Court; can only review exercise of that discretion, 122 C 64
- Superior Court cannot exercise a primary jurisdiction which by statute is reposed in Courts of Probate, 122 C 64
- on appeal from allowance of account of widow as administratrix, Superior Court might disallow payments made under decree of court as widow's allowance, where Probate Court could not have reasonably done otherwise than terminate allowance if attention had been called to it, 122 C 79
- otherwise Superior Court can only remand case to Probate Court for action by it, 122 C 79

- rights and duties of Superior Court on appeal from decree disallowing administrator's account, 124 C 216
- functions of court on appeal from public utilities commission, 126 C 543 and see PUBLIC UTILITIES COMMISSION
- full hearing before civil service commission of appeals to it being required by law, no constitutional requirement for hearing de novo in appeal to Superior Court; usual rules de appeals from administrative board apply, 128 C 35
- Superior Court may grant relief against decrees of Probate Court procured by fraud, accident and mistake, 129 C 309
- Probate Court has no power to open decree it has made on such a ground, 129 C 316

SUPERSEDEAS

See APPEAL TO THE SUPREME COURT § 16

SUPREME COURT REPORTS

- are product of mental labor of judges and reporter; are property of the State, 53 C 419
- State may copyright reports and opinions and say when and how they shall be published, 53 C 419
- taking of copyright does not offend rule that judicial proceedings shall be public, 53 C 419
- under statute, right of reporter to print from stereotype plates *held* to be exclusive, 59 C 332
- such right was not determined by resignation or death but was property subject to his disposal, 59 C 335
- prior to passage of this act, reporter was absolute owner of the volumes, 59 C 335
- reporter *held* on mandamus not obliged to furnish copies for publication in a weekly magazine in advance of official publication, on tender of fees, 61 C 418
- nor to allow copies to be made for advance publication, 61 C 418
- State has right to direct as to publication of Supreme Court reports, and having directed, an applicant has no right to copies for earlier publication, 61 C 419
- and this independently of copyright, 61 C 419

SURETYSHIP

- § 1. IN GENERAL
- 2. LIABILITY OF SURETY
- 3. DISCHARGE OF SURETY
- 4. RIGHTS OF SURETY; SUBROGATION
- 5. RIGHT OF SURETIES AGAINST EACH OTHER; CONTRIBUTION

See also GUARANTY; INDEMNITY

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TAXATION

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§ 1 Taxation

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sale of land with mutual agreements to pay taxes is good, but each one must be ready to perform his part, 91 C 332

oral promise by grantee to pay taxes as part of consideration is a good defense in an action by him to recover taxes under grantor's covenant against incumbrances, 91 C 651

only when taxing statute is ambiguous, is it resolved in favor of taxpayer, 93 C 648

statute de state tax makes the State interested in the collection of town taxes on all taxable property, 94 C 545

assessment of special benefits is an exercise of the power of taxation, 95 C 311

assessment of local benefits for a public improvement distinguished from taxation, 96 C 523

enumeration of certain subjects as exclusion of others, 97 C 411

right of tax commissioner to bring mandamus does not supersede pre-existing right of state's attorneys, 104 C 542

validating acts, curing irregularities of tax officials, are constitutional, 104 C 579

nature of tax imposed after death on property not included in assessment of decedent, 106 C 525

—can only be imposed on property subject to taxation in the State, 106 C 525

—may be upon mortgage debt owned by resident of Connecticut though mortgage in hands of attorney in another State to collect interest, 106 C 526

contract by city to pay part of taxes assessed against water company *held* not to include federal taxes not in existence until long after, 106 C 562

provision in grant by city to street railway company for extension of lines that company pay percentage of receipts to city *held* not a tax but a voluntary contractual obligation, 107 C 312

—two distinguished, 107 C 312

—tax defined; not a debt, 107 C 332

—question is determined on nature of payments, not what they are called, 107 C 334

determination as to taxability of property against real owner cannot be made unless he is a party, 107 C 519

effect on subleases of covenant in original lease for payment of taxes, 107 C 697

retaliatory taxation, 112 C 474

foreclosure of judgment lien by creditor who also holds mortgage to secure debt; unpaid taxes do not prevent mortgage being

“first charge” so that value of property will be first applied to debt, 112 C 652

right of taxpayer to recover from city treasurer extra compensation paid to assessors for reassessment required by statute, 116 C 9

right of subrogation does not extend to let individual avail himself of remedies for collection of tax by public bodies, 123 C 232

—but mortgagee may have benefit of payment of taxes he has made, 123 C 232

reason for denying right of subrogation in case of tax lien is impropriety of permitting individual to avail himself of remedies designed only for use of public bodies, 123 C 232

contributions under Unemployment Compensation Act are taxes, 128 C 87

§ 2. Power to Tax; Validity

as the power to tax is derived exclusively from statutory provision, statutes must be strictly followed, 7 C 550, 14 C 72

school district tax; special object of tax need not appear in the vote, 12 C 438

—if otherwise, what showing is sufficient, 12 C 438

vote imposing school taxes inartificially drawn *held* valid, 15 C 327

tax partly for legal and partly illegal purposes is wholly illegal, if inseparable part of tax is illegal, 31 C 351

town can tax only under authority; cannot in order to pay claim long barred, 69 C 206

power of Legislature and its limits, 73 C 255, 85 C 344

—can compel town to tax for another public agency, 68 C 131

school district can tax to pay old debts, 76 C 695

town cannot, by its vote, decrease tax once assessed, 81 C 367

placing restrictions on city's power to tax is to protect taxpayer, not to cripple city, 81 C 660

power to tax is an arbitrary one and must be strictly used, 84 C 122

a tax can be imposed to pay for a repavement as well as for the original pavement, 84 C 384

taxation is a sovereign power residing in the Legislature and limited by the Constitution only, 85 C 344

taxation is forbidden for any but public purposes by Article IV, § 4 of United States Constitution and Fourteenth Amendment, 85 C 344

taxation is for a public purpose if it supports government or objects of government and promotes people's welfare in equal measure, 85 C 345

state aid, to be good, must be associated with necessity, 85 C 345

tax cannot be laid for benefit of soldiers and sailors of States other than that laying it, 85 C 345

on consolidation of two cities, scheme of taxation *held* to leave the incident of local burden where it was, 88 C 461

policy of cities to tax outlying districts at lower rate, upheld, 88 C 480

city has only that power to tax that is given it, 88 C 481

considerations for determining whether object of taxation is legitimate, 89 C 399

power to tax extends to every trade or occupation, object or industry, use or enjoyment, 90 C 662

license fee on sign boards based on right to tax, not on police power, 90 C 662

—fact that fee comes under license act, a violation of which is a misdemeanor, does not militate against its taxation character, 90 C 662

taxation of advertisements on bill boards allowed, 90 C 662

essence of an ordinance, rather than its language, determines whether a city exceeded its power of taxation; licensing of auctioneers, 94 C 269

the State and not a city determines whether latter's bonds are taxable, 94 C 543

town's power to tax not a property right but attribute of sovereignty, 101 C 191

—therefore Orange not necessary party in condemnation of land in Orange by New Haven, 101 C 191

where one town condemns property in another for public park, latter is not entitled to compensation on basis of power to tax, 101 C 191

the power of a town to tax is always subject to legislative control, 101 C 191

taxpayer under no duty to ascertain legality of tax before he pays it, 103 C 249

power of taxation is vested in General Assembly, 104 C 192

power of General Assembly to provide, or dispense with, conditions, means and methods of taxation, 104 C 579

after repeal of charter provision requiring submission of tax rate to a town meeting to be held on a certain day, failure of sewer commissioners to fix rate before that day, as required by charter, is merely failure in directory provision, 112 C 543

expense of covering sludge beds of sewer system to prevent noxious odors *held* properly regarded as cost of maintenance rather than original construction, and properly included in tax to cover that item, 112 C 543

where power to lay county tax was vested in county meeting, this required that a

meeting should fix or render definitely determinable the amount of tax to be levied and the power to do this could not be delegated to county commissioners, 124 C 611
considerations involved in fairness of tax should be addressed to Legislature, not to courts, 128 C 562

Legislature may determine choice of subject matter of taxation and extent and manner of tax, save as constitutional limitations may intervene, 128 C 562

§ 3. Equality and Uniformity; Double Taxation

See also CONSTITUTIONAL LAW § 4

double taxation ought to be avoided on grounds of policy, 35 C 7, 40 C 491, 61 C 102, 212

—but if imposed by statute courts must uphold it, 35 C 20

construction increasing inequality of taxation to be avoided, 40 C 491

necessity of equality, 73 C 255, 74 C 449, 76 C 97, 235, 77 C 654

succession tax *held* constitutional, 76 C 235

statute imposing death duties making arbitrary distinction between estates of \$10,000 and those of greater amount *held* not discriminatory, 76 C 235

double taxation to be avoided, 77 C 45

no provision of state Constitution requires taxation to be equal and uniform; lack of it does not make tax invalid, 85 C 119, 90 C 663

Legislature can discriminate, in taxing city water supply, between towns whose inhabitants are permitted to use water on equal terms with city's inhabitants and those which are not, 85 C 120

taxation of outlying wards of a town may be at a different rate than the city wards, 88 C 480

construction of an act which leads to double taxation is to be avoided, but not if legislative intent is plain, 90 C 662

federal and state Constitutions do not require state taxation to be equal and uniform, 90 C 663

a construction of statute that leads to double taxation should be avoided as also taxing property that receives no benefit, 92 C 672

where taxing statutes discriminate between classes, only substantial justice is required, 94 C 48

—a fair and lawful apportionment as tested by its results, 94 C 48

no constitutional requirement that state taxation be equal and uniform, 104 C 192

due process and equal protection of the laws as applied to taxation, 104 C 192

classification for taxation must be reasonable, not arbitrary, and uniform within the class to which it applies, 107 C 697

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method of taxation in plain violation of law not fair and equitable, 108 C 246
no defense to action by state's attorney to compel adherence to legal methods of taxation that individual bears expense, 108 C 246
act making land leased by certain ecclesiastical society assessable against lessee is class legislation, 109 C 388
—is arbitrary and not based on difference having relation to subject of legislation, 109 C 388
—deprives lessee of equal protection of law guaranteed by federal and state Constitutions, 109 C 388
undesirability of double taxation as canon of judicial action, 111 C 605
tax on transfers to take effect in possession or enjoyment after death *held* a permissible classification of appropriate subject of taxation, 114 C 220
assessment of 75 per cent of real value by board of relief when assessors used 100 per cent would result in inequality and discrimination, 115 C 578
—but where result correct, taxpayer not aggrieved, 115 C 578
corporation business tax should be construed in case of doubt to avoid double taxation, 122 C 547
Legislature has power to provide for double taxation although this result will be avoided where terms of statute are doubtful, 127 C 510
latitude wide in classifying property for taxation constitutionally, 128 C 219

§ 4. Exemptions

§ 5. —In General

no exemption of land conveyed to white man in trust for negro, to apply and convey on condition, 24 C 28
—party must bring his case clearly within provision of statute, 24 C 32
quadroon is exempt, by statute exempting estate of "colored persons," 29 C 407
increased stock is as exempt as original issue, when, 30 C 290
banking house included in exemption of capital stock, 31 C 106
—so also building, though erected in violation of charter, 31 C 106
capital of bank embraces all property, real and personal, 31 C 106
construction of charter; building lots exclusively used for farming purposes, 31 C 351
savings bank deposits; no deduction for United States securities, 32 C 173
—tax is on the bank, not on its property, 32 C 173
railroad bonds are not exempt as property of holders, 33 C 187

what property exempt as necessary to bridge company's "appropriate business," 35 C 7
act of 1864 exempts all property of company, whether used for railroad purposes or not, 40 C 491
property "required for their appropriate business" need not be in use at all times, 40 C 498
—so dock and wharves of railroad company; exclusive use not required, 40 C 498
whether room rented by railroad company to steamboat company is exempt, *quaere*, 40 C 498
damages for land taken by railroad company are not taxable within sixty days of award, 41 C 206
New Haven & Northampton Railroad Company *held* exempt to same extent as old canal company, 42 C 103
—not affected by statute taxing railroad companies, 42 C 103
—exemption of the canal company is a corporate as well as property exemption, 42 C 103
all property held by municipality for public use is exempt, 44 C 361
—so land bought, under legislative act, in another town, for public reservoir, though water is sold to consumers, 44 C 361
—excess of land over that needed is not exempt, 44 C 361
statutes exempting from taxation to be construed with reasonable strictness, 59 C 166
repeal of exemption in special charter by general law, 66 C 475
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exemptions of one producing crops includes one who grows hay on shares, 79 C 294
where power plant owner put in a list "including water power" which was taxable in another town at more than the amount to be taxed by its charter, *held*, it did not appear that apportionment by charter was an exemption of part of the property, 83 C 561
tax exemptions to corporations are not contractual rights, but can be changed, 84 C 277
the right to use and actual use of land as a water supply is necessary to make it exempt from taxation, 84 C 522
city property used for the public not taxable; even if in another municipality, 87 C 229
ferry operated by lessee of city not taxable, 87 C 229
agricultural society exempt from taxation; not against public policy because it happens to make money, 88 C 627
joint stock company to give agricultural fairs is exempt, 88 C 627

Legislature may grant exemptions, 89 C 399, 92 C 107
 —but they are to be strictly construed, 85 C 678
 not unconstitutional to exempt land planted with forest trees, but one must fairly comply with act, 89 C 394
 power to tax implies power to exempt, 89 C 399
 buildings owned by a foreign corporation as a health resort for tired out and over-worked persons taxable, 90 C 504
 land and building of city for city use is exempt; a town farm even in another town, 91 C 589
 land necessary for care of town poor, even if some of its surplus products are sold at a profit, is exempt, 91 C 589
 statute permitting taxation of a town farm for school purposes exempts it for other purposes, 91 C 590
 land purchased for public purposes but abandoned is taxable, 91 C 590
 assessment of benefits is not a tax under statute de exemptions, 91 C 595
 when a company receives state aid and is non-taxable, 92 C 99
 “state aid” not confined to pecuniary help; means help and assistance from State of every kind; exemption from ordinary taxation is such aid, 92 C 99
 basis of exemption, 92 C 107
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 —if issued before 1917, not exempt unless by special law, 94 C 543
 tree plantations under act of 1911; requirements of “continuance” of plantation, 94 C 583
 —destruction of trees by rodents and inability to restore because of war conditions, 94 C 583
 —certain acreage could not be separated from the whole so as to remove exemption from it, 94 C 583
 exemption of institutions that receive state aid, 95 C 50
 —requires actual receiving of aid, not merely right to it, 95 C 50
 —property exempted must be owned, not merely possessed, 95 C 50
 “buildings with their appurtenances, belonging to any county, town or borough,” construed, 95 C 544
 —includes an electric light plant owned and operated by city, 95 C 544
 —and as incident to it a small tract in another town containing a grist mill, which it has to operate by the terms of an old grant, 95 C 544

—includes all property held by a city for public use, 95 C 544
 statute exempting property fully assessed and taxed in another State construed, 106 C 525
 exemption of money in savings bank as property in another State there taxed except money loaned at interest, does not exempt bond secured by mortgage of real estate in another State, 106 C 526
 property owners’ association *held* to be municipal corporation, 112 C 515
 —water pipes to furnish water for fire protection, home use, etc., are held for public purpose, 112 C 515
 —those within corporation limits are exempt, but not those used to distribute water to another settlement outside limits, 112 C 515
 after general revaluation of taxable real estate in a town, tree-growth upon land certified is exempt under statute, 114 C 724
 tax exemptions are to be construed strictissimi juris, 115 C 134
 —but rule will not be pushed to extent of unreasonableness, 115 C 134
 —intent of Legislature must be carried out, 115 C 134
 statutes granting exemptions to be strictly construed and property not exempted unless clearly within their terms, 116 C 172
 —but such construction does not permit contravention of intent of statute as expressed in its language, 116 C 172
 —exemption of stock where corporations merged *held* to include situation where they consolidated, 116 C 172
 exemptions are of grace and must be strictly construed; they embrace only what is strictly within their terms, 125 C 52, 129
 purpose of reciprocal exemption provisions, 127 C 441
 of state savings bank under Unemployment Compensation Act, 128 C 78 and see UNEMPLOYMENT COMPENSATION ACT
 rule of liberal construction in favor of taxpayer does not apply as regards claim of exemption from law of general application imposing a tax, 128 C 82

§ 6. —Educational, Religious and Charitable Uses

act of 1702 exempts money at interest for maintenance of ministry, 6 C 223
 ministry lands leased to third person remains exempt from taxation, 7 C 335
 buildings taxable against lessee though land exempt, 10 C 490
 land *held* on the facts to be granted for pious uses; exemption is not waived by payment for twenty years, 11 C 251
 lands given for use of ministry taxable against lessee for 999 years where lease

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- stipulated he should pay the taxes assessed, 14 C 228
- repeal of act of 1702 affects what lessees, only, 14 C 228
- one Legislature may exempt from taxation in future, so as to tie hands of subsequent Legislatures, 21 C 481
- repeal of act of 1702 cannot subject to taxation if the estate was properly granted for pious uses under such act, 21 C 481
- estate must have been sequestered in express terms, 21 C 481
- grant to ecclesiastical society expressly, without condition, is not within statute as a grant for religious or charitable purposes, 21 C 481
- ministry lands are subject to tax in hands of private parties, 30 C 160
- lease for 999 years is for all practical purposes a fee simple, subject to tax by act of 1859, 31 C 407
- an evasion of act of 1702; such land is not exempt, 31 C 407, 36 C 116
- contra, 6 C 223, 7 C 335, 11 C 251; overruled, 36 C 116
- statute of 1702 is not a contract of perpetual obligation, 36 C 116
- contra, 11 C 251
- property conveyed to public use prior to 1821 may be taxed at the will of Legislature, 38 C 274
- but if still used for pious purposes the act of 1821 protects it, 38 C 274
- statute of 1702 has never been repealed, 38 C 288
- store bought with funds devoted to pious uses, is exempt, though rents are appropriated to general uses, 38 C 289
- store bought by ancient fund mingled with another, is not exempt, 38 C 289
- lessee's building on exempt land taxable, 51 C 259
- facts *held* not to exempt pavilion of camp meeting association, 54 C 152
- church building to be exempt must be used exclusively as a church, 54 C 155
- cottages on camp meeting grounds *held* taxable in name of occupants and lessee, when, 54 C 153
- statute de taxation was not designed to cover any building earning money applicable to secular uses, 54 C 153
- exemption by charter of property of school for "promotion of science," *held* to include property of which only the income was used for such purpose, 59 C 163
- as well as property directly used for science, 59 C 163
- property used as a country house for professors in the various colleges of the Society of Jesus and as retreat for priests, *held* not exempt, 61 C 228
- even if belonging to ecclesiastical society, yet it was not "exclusively used" for the purposes of that society, 61 C 229
- ecclesiastical societies under statute are local, organized under our laws and connected with some church organization, 61 C 229
- whether property appearing of record as owned absolutely by an individual while held in fact for an ecclesiastical society, is a sufficient owning under statute, *quaere*, 61 C 229
- exemption of "funds invested" does not include land; church, used occasionally for lectures, still exempt, 66 C 368
- clause of charter exempting lands from taxation as long as avails used for education; *held* lands exempt only when corpus of land, and not merely its income, used for purpose specified, 66 C 474
- exemption to theological seminary *held* not to extend to land used to produce income for payment for instruction, 66 C 475
- vacant lots, houses and factories of Yale University exempt unless rents derived therefrom carried annual income above \$6000, 71 C 316
- cemetery association, free from taxation, must pay for sidewalk assessment, 83 C 204
- land, used for work and recreation of inmates of an institution exempt from taxation, is also exempt, 85 C 674
- "buildings" of certain institutions exempt from taxation includes land on which they stand and adjoining land for campus and playground, but not gardens at employees' homes, 87 C 474
- private school conducted with profit to owner not free of tax, 88 C 241
- property devoted to public use free of tax, 88 C 241
- policy not to tax gifts to educational and charitable uses, but Legislature may provide otherwise, 92 C 99
- intention to tax such gifts must be clearly expressed, 92 C 99
- organization devoted to furthering legislation in advancement of public causes is not a benevolent or charitable one, 95 C 50
- not everything that makes for the public good is charitable, 95 C 50
- gifts to charitable corporations in New York not exempt under law prior to 1925 statute, 105 C 192
- academy defined; Pomfret School *held* not devoted to public use nor its property dedicated thereto, 105 C 456
- test of exemption of benevolent institution is sequestration from private and devotion to public use, 105 C 459
- whether statute exempting charitable property creates continuing contractual obligation on part of the State, *quaere*; such

- statute *res inter alios* in tax appeal by lessee of property, 107 C 697
- expensive private school conducted by religious order *held* not entitled to exemption, 108 C 136
- property not sequestered to public use nor impressed with charitable trust where on dissolution it would be distributed to members of corporation, 108 C 136
- that they have taken a vow of poverty *nil sig.*, 108 C 136
- exemptions created by public law constitute contractual obligations not repealable when, 108 C 246
- will not be construed as irrevocable surrender of sovereign power, if this can be reasonably avoided, 108 C 246
- statute of 1702 exempting gifts for ministry or charity *held* not to be irrevocable, 108 C 246
- exemption of schools under act of 1927 considered, 111 C 203
- to secure it, school must be so organized that no officer, member or employee may make a profit, 111 C 203
- corporation without capital stock organized to conduct school with no other limitation on use of property *held* not exempt, 111 C 203
- though upon its dissolution assets are to go to church, 111 C 203
- act of 1931 limiting exemptions on gifts to educational institutions in other States; applicability where decedent died before passage but estate was not distributed when act became effective, 115 C 127
- statute made applicable to pending proceedings *held* to apply where appeal had been taken to Superior Court and was pending when statute passed, on reservation in Supreme Court, 115 C 127
- residuary gift to Harvard University to be retained as a perpetual memorial *held* exempt from tax under act of 1929, 115 C 127
- Harvard, like Yale, Wesleyan and Trinity, is an institution of a public character, without authority to make any profit, 115 C 136
- history of Harvard, 115 C 136
- underlying theory and intent of Legislature in exempting certain corporations was not to exempt private property but property, public or private, sequestered to service of public; decisions reviewed, 117 C 379
- churches and colleges have always been considered as ministering to public use, 117 C 383
- Stamford Jewish Center *held* not public school offering instruction to all comers and hence not exempt, 117 C 379
- provision in by-laws for philanthropic and recreational activities referring to furnishing club rooms did not exempt it as there was no provision that these could not be rented for profit, 117 C 379
- but amendment to articles providing that surplus income and all assets in case of dissolution be applied to certain religious and educational purposes amounted to sequestration for public use within exemption statute, 117 C 379
- certificate of amendment not recorded until October 15, 1932; tax list filed October 1; corporation not exempt on list of 1932, 117 C 379
- history of exemption statutes reviewed, 119 C 53
- property of educational institutions in more restricted sense of affording systematic instruction and training for young in preparation for life work, exempt, 119 C 53
- statute not applicable to educational institutions in broad sense such as Masonry, 119 C 59
- finding of court that Masonic lodges not exclusively organized nor temple nor any portion of it exclusively used for charitable purposes sustained, 119 C 53
- that building devoted to religious uses to be exempt should be place of public worship implicit in theory of exemption, 119 C 53
- organization which meets in secret, membership in which is dependent in part on social considerations and ends in part are social does not conform to these standards, 119 C 53
- and change in statute in 1929 of “churches” to “houses of religious worship” did not affect exemption of buildings not having those essential characteristics of churches, such as Masonic organizations, 119 C 53
- to entitle property to exemption it must be sequestered from private and devoted to public use, 119 C 106
- performance, though by private corporation, of functions which otherwise would devolve on State or municipality at root of exemption, 119 C 109
- Connecticut Junior Republic distinguished from Brunswick and Pomfret schools and *held* to have public character appropriate and essential to exemption, 119 C 106
- boy scouts corporation without capital stock attempted amendment of charter to exempt property from taxation, 121 C 466
- amendment not effective because not voted by “incorporators, their associates and successors” at meeting duly called to consider amendment, 121 C 466
- but, instead, by meeting of “members,” who were not shown to be incorporators, associates or successors, 121 C 466
- power to amend so definitely vested in and confined to incorporators that it could

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not be delegated to subsidiary body such as executive board, 121 C 472

—without amendment no support for finding that officers, etc., are excluded from pecuniary profit or its property segregated from private and dedicated to public use, 121 C 466

—but conclusion that plaintiff was organized exclusively for educational and charitable purposes and its real property used exclusively to carry them out sustained, 121 C 466

—not invalidated by operation of camp, payment of camp charges, camp store, etc., 121 C 474

—and legal adoption of amendment will accomplish exemption except that it should provide for conveyance of surplus assets on dissolution to similar organization or to trustees for same uses, 121 C 466

—plaintiff entitled to seek declaratory judgment, 121 C 466

where executor instead of selling real estate in residue as directed in will, distributed it to college as part of residue, real estate to be treated as personal property for purposes pertaining to settlement of estate, 123 C 196

—it retained its nature as personalty until college by election through acceptance of distribution of it in original state worked reconversion of it into real estate, 123 C 196

—and not until distribution (November, 1935) did college's right of exemption attach to the real estate, 123 C 196

—and taxes, levied thereon by town, as of October 1, 1935, and previously were valid, 123 C 196

underlying purpose of provision in federal estate tax law for deduction of "altruistic gifts" is to benefit those organizations which serve a public not a private purpose, 123 C 560

property used for retreats of ministers and others, having large living accommodations and a small chapel, *held* not house of religious worship or dwelling-house held in trust for religious organization and actually used by its officiating clergyman so as to be exempt under statute, 125 C 52

property acquired by trustees with intention of using it for public purposes, but which on taxing date had not been so used, not exempt under statute, 125 C 129

Legislature can tax all charitable trusts or only such of them as are characterized by distinguishing elements, 126 C 675

rule that statutory provisions making exemptions from general laws are to be construed strictly applies to gifts of a charitable nature, 127 C 441

in comparing laws of another State with our own to determine whether similar exemptions are granted, the totality of their operation not test, 127 C 441

—if particular gift in question if made to charity located here would be exempt, similar gift to charity of that State is exempt under our law, 127 C 441

—so where New Jersey imposed tax on gift of certain type on amount in excess of \$5000, if amount of gift to New Jersey organization does not exceed \$5000 it is exempt here, but if it does exceed \$5000 the gift is taxable here as a whole, 127 C 441

bequests to charities incorporated under act of Congress or laws of District of Columbia are exempt here, as they are "corporations of any state," as words are used in our statute, 127 C 441

basis upon which rests policy of granting tax exemptions to charities, 127 C 443

§ 7. Situs of Property for Taxation

real estate in any school district is taxable there, whatever owner's residence, 4 D 376, 11 C 479

bank stock of company having no legal limits is not taxable in town where office is, 3 C 15

—such corporation not an "inhabitant" within statute de collection of taxes, 3 C 15

savings banks owning stock are subject to taxation at place where bank is located, 20 C 111

insolvent's estate to be classed with estates of residents though trustee a nonresident, 30 C 402

executor or administrator during settlement of estate is not a trustee within meaning of statute requiring personal property in hands of trustee to be set in list of town in which trustee resides, 38 C 443

during settlement of estate personalty is taxable in domicil of deceased, 38 C 443

—if in hands of heir or legatee is taxable in domicil of latter, 38 C 443

—when in hands of trustee is taxable where he resides, 38 C 443

—as to place of taxation, an executor or administrator is not a trustee, 38 C 443

principal place of business of company, under statute, 40 C 65

—bona fide change not prohibited by charter, 40 C 65

power to tax money loaned to nonresident and secured by mortgage on land outside this State, 42 C 426

mercantile business carried on in this State by nonresident is taxable here even though the goods are taxable in another State, 56 C 351

- but a horse and wagon used here in connection with the business is not taxable, 56 C 351
- tax on railroads running into another State is constitutional; is tax on property located and used in State, 60 C 327
- foreign companies are presumed to be taxed in the States where they are located, 61 C 212
- duty of assessors to ascertain that they are not so taxed, 61 C 212
- stocks of companies located in other States are within statute when owned by residents of this State, 61 C 211
- it makes no difference whether the companies are public or private, 61 C 211
- power of State to give stock situs within itself for taxation, 70 C 590
- water power created by a dam in this State is taxable here though transmitted to adjoining State, 73 C 294
- statute de listing in town where used rather than in town where dam located, applies only to Connecticut towns, 73 C 294
- where water power plant is partly in two towns, 76 C 169
- all personal property of decedent, though some portion of it outside State, to be taken into account in computing succession tax, 76 C 617, 77 C 644, 657
- amendment taxing personal property in this State of nonresident not in conflict with this, 76 C 617
- situs of water pipes and mains owned by corporation, 79 C 70, 85 C 120
- taxing personal property outside State is constitutional, 81 C 537
- election of taxpayer, made in good faith, as to where his property will be listed, must be regarded, 82 C 266
- a lumber business is carried on in the town in which the lumber is cut and stored, 82 C 266
- actual, not legal, situs of property determines its taxation, 82 C 406
- statute de taxing mercantile or manufacturing business in town where it is carried on has nothing to do with taxation of cash in banks, 82 C 406
- in case of property of foreign corporation in hands of ancillary receiver, actual situs controls, 82 C 406
- personal property of a foreigner, actually located in the State, can be taxed, 82 C 409
- bonds of corporations of other States prima facie taxable here, 83 C 493
- if not taxable, burden on taxpayer to show it, 83 C 493
- State can determine situs of property for taxation; power plant in one town and utilized in another; tax apportioned between towns, 83 C 561
- every city is entitled to benefit of all real estate within its borders for taxation, 85 C 6
- land owned by city, but not used for water supply, is taxable where located, 85 C 120
- situs of personal property for taxation is residence of owner, 92 C 316
- taxation rests on doctrine that movables follow person of owner and on the protection the State affords, 92 C 316
- because New York State can tax Connecticut funds there deposited does not prevent Connecticut from taxing them also, 92 C 316
- bank deposits in another State when corporation's principal place of business is here, taxable here, 92 C 316
- goods within taxing district only are taxable, 92 C 672
- manufacturing company is taxed only on goods on hand within the taxing district, 92 C 672
- any building in which any part of a corporation's business is carried on is an establishment under the statute, 92 C 672
- taxation of water power companies governed exclusively by statutes, 101 C 383
- a dam is "incidental to machinery operated by it," therefore taxable only in town where power plant is located, 101 C 383
- same rule applies to poles and wires constituting transmission line, 101 C 383
- land under dam taxable where located, 101 C 383
- property or ad valorem tax may be imposed on intangibles by State of owner's domicile, 105 C 193
- so by State where evidences of debt are, if they are held there more than temporarily or have acquired there a business situs, 105 C 193
- right to assess property tax depends on situs of property, 105 C 203
- State of decedent's domicile may not tax tangible personalty located in another State, 105 C 192
- intangible personal property is taxable at domicile of owner whether or not taxable elsewhere, 105 C 192
- reciprocal exemption statutes prevent double taxation, 105 C 192
- proceeds of life insurance policy payable to estate of deceased taxable at his domicile, 105 C 192
- federal, state and municipal bonds regarded as tangible personalty, 105 C 192
- situs of debt is domicile of creditor, 106 C 525

§ 7 Taxation

- mortgage bonds on New York real estate may be taxed here when owned by Connecticut resident, 106 C 525
- bond secured by mortgage of land in another State is within statute requiring listing of notes, bonds and choses in action, 106 C 526
- rule that public securities are tangible property for tax does not include private specialties such as mortgage bonds and other negotiable paper, 106 C 526
 - such property may have “business situs” but merely leaving mortgage in hands of attorney in another State to collect and remit interest does not give it such situs, 106 C 526
 - that intangibles are taxed in another jurisdiction than domicil of owner does not prevent their taxation there, 106 C 526
 - nature of business situs, 106 C 537
 - provisions of Fourteenth Amendment of United States Constitution does not prevent taxation at two places, 106 C 526
- exercise of power of appointment not taxable here where donor of power died in New York, 111 C 594
- title passes by will of donor, 111 C 594
 - immaterial that donee “blended” property with his own, 111 C 594
 - double taxation might result, 111 C 594
- succession tax applies to land within this State and personal property wherever situated, the disposition, distribution and succession to which is governed by our laws, 114 C 208
- held* to apply to estate of Connecticut residents though transfer in contemplation of death was made in New York, where was situated the intangible personal property, stocks, bonds and a check on a New York bank, 114 C 208
- application of penalty tax to bonds secured by real estate in New York and physically in hands of agent there, in estate of resident dying here, 118 C 101
- discussion of business situs theory and review of authorities, 118 C 101
 - must be continuous or permanent business in State where it is sought to establish situs as distinguished from temporary business or isolated transactions, 118 C 101
 - property must be localized in some independent business, 118 C 101
 - and where in instant case agent merely managed decedent’s investments, collected income, etc., *held* there was no business situs of bonds in New York, 118 C 101
- as regards bonds, maxim *mobilia sequuntur personam* applies and State where decedent resides at death may impose succession tax upon them though they are located elsewhere, 118 C 233
- same principle applies to transfers intended to take effect in possession or enjoyment at or after death, 118 C 233
- holder of determinable fee is to be regarded as owner for purposes of taxation, 119 C 106
- plaintiff derived title to property from New York corporation, deed providing reverter to latter if grantee failed to use it for certain purposes; *held* property falls within statutory designation as “real property of Connecticut corporation,” 119 C 106
- trusts executed outside State to nonresident trustee depending for enforcement on laws of that State, consisting of securities kept there, not out of Connecticut jurisdiction to tax as transfers, 122 C 107
- domicil at death is determinative of right to tax rather than at time of creation of trust, and so taxability of trust not affected by fact that at time of creation settlor was domiciled elsewhere, 122 C 109
- trust funds entrusted to trustee in New York to manage, pay over income and eventually principal, have no such “business situs” there as to prevent taxation here, 122 C 107

§ 8. Assessment

§ 9. —In General

- assessor illegally altering list is liable to party damaged; presumed to be malicious, 27 C 221
- assessment list is not a record, 30 C 395
- one giving in list estopped from claiming listed property not taxable, 30 C 398, 51 C 259
- assigned insolvent estate to be put in list of residents, though trustee be nonresident, 30 C 402
- assessment in name of nonresident corporation before notice of its insolvency, *held* valid, 36 C 284
- but increase for not making out its list is invalid, 36 C 284
- list validated by act validating past and future lists, is not invalidated by subsequent act validating future lists, 44 C 477
- statute de penalty for failure to file list, *held* not retroactive, 58 C 269
- “assessment” means ordinarily the official valuation of property for taxation, 60 C 327
- statute as to deduction of note on which state tax has been paid, construed, 64 C 575
- of indebtedness in certain cases, construed, 76 C 666
- obligation to bring in list is personal to each taxpayer, 81 C 644

power of board of relief to deduct indebtedness from list of debtor applies only when deduction can be put on creditor's list, 83 C 493

by Chapter 201, Acts of 1911 only penalty for not filing tax list is 10 per cent and this is waived by the act as to nonresidents, 89 C 435

resident or nonresident taxpayer, not putting in list, cannot complain if assessors make a mistake in listing and valuing his property, 89 C 435

General Assembly may dispense with the methods, means and requirements of assessment and levy and collection of taxes that it prescribed, 90 C 312

assessors and board of relief act in administrative capacity, 103 C 613

perfected assessment list of town not best evidence that individual assessment is legally made, 107 C 133

—but if it comes in without objection may be basis for that finding in connection with presumption that public officers have done duty, 107 C 133

validating act may cure defective or irregular assessment, but not one wholly void at its inception, 107 C 697

board of relief is not agent of town under statute de making supplemental list of omitted property; its duties are administrative, 107 C 700

oath to tax list does not extend to valuations stated, 108 C 117

Chapter 325 of the Public Acts of 1927 unconstitutional as to validating certain assessments, 108 C 246

denial of mandamus to compel board of relief to add property to list upheld where it exercised judgment in good faith in omitting it, 111 C 427

omission of certain taxable property from tax list, not in bad faith, will not ordinarily invalidate tax, 112 C 544

statute providing that "during each period of ten years after February 1, 1930" assessors of all towns and cities shall view and revalue all real estate, 122 C 218

—purpose is that at least once in each ten year period each piece of real estate should be viewed and revalued; but it is not required that this be done as to all properties in same year, 122 C 218

—assessment of Bristol for 1935 not invalid, though assessors misunderstood law, 122 C 218

obligation to file tax lists personal to each taxpayer, 123 C 546

statements in tax list as to personal property admissions as to extent of ownership of such property, 127 C 597

—if put in by agent without authority, they are admissible if later ratified, 127 C 597

§ 10. —Persons and Property Subject to deposits in savings bank are not properly "stock," 20 C 117

"mill" in statute includes machinery therein; nonresidence of owner is not material, 30 C 18

tollbridge; taxation of wharves; use as bearing on charter; "appurtenant property" treated as personalty; docks and wharves are not appurtenant, 35 C 7

note for land secured by mortgage, is subject to taxation, though note is not on interest, 39 C 176

—no defense that note was listed as "money at interest," 39 C 176

damages for land taken, assessed before October 1 but not paid until after that day, not assessable, 41 C 206

before foreclosure and failure to redeem, land is not taxable as mortgagee's, 46 C 243

—after foreclosure is not taxable as mortgagor's, 46 C 245

perfected foreclosure is a "transfer" within statute, 46 C 243

nonresident summering here is not liable to tax on personalty, 47 C 477

—failure to apply to board of relief is no waiver of additions by assessors, 47 C 477

—voluntary putting in certain personalty is no consent to such additions, 47 C 477

—selectmen are not liable in trespass for signing rate bill and procuring warrant on such list, 47 C 477

—remedy is by assumpsit against town, 47 C 477

personal property of nonresidents as a general rule not taxable, 47 C 484

whether foreign company by giving in sworn list submits thereby to jurisdiction of assessors, *quaere*, 51 C 259

—payment of the 10 per cent addition when involuntary, 51 C 259

building of lessees on leased land is taxable, 51 C 259

under statute of 1875, a nonresident is not liable to 10 per cent penalty for failure to give in list, 56 C 351 but see § 3809, Rev. 1888, 56 C 354 (note)

real estate is not validly listed in name of agent of owner, 59 C 422

safety fund of insurance company held by a trust company subject to trust, *held* not taxable as property held in trust for certificate holders, 61 C 89

capital stock of company for purposes of taxation consists of what, 61 C 101

statute requiring trustees to make return of property in their hands from which income or interest is sought to be derived, 61 C 112

money in the hands of receivers of insolvent life insurance company awaiting order of

§ 10 Taxation .

- court for distribution, does not "belong" to them within statute, 61 C 112
- shares of partnership which are transferable like those of a company are "personal property" within statute, 61 C 211
- so *held* of the American Express Company and the United States Express Company, 61 C 211
- material in process of manufacture included in "property invested in mechanical and manufacturing operations," 65 C 461
- listing real estate in name of record holder; change of name by corporation, 66 C 475, 91 C 589
- real estate owned by and in possession of tenant by curtesy shall be listed in his name, though at time estate of his deceased wife was in process of settlement, 67 C 272
- listing property to an estate, 68 C 294
- land *held* validly listed in name of corporation and not in name of its receiver, 72 C 57
- listing land held by life tenant, 74 C 94
- quarry leased to remove ore should be assessed in name of lessor not lessee, 75 C 590
- freehold interests, not leaseholds, taxable by statute to party in whose name title stands on land records, 75 C 592
- taxation of mortgage debt, 76 C 672
- effect of listing property of wife as that of husband; of listing land as one tract; estoppel, 76 C 695
- bridge structure of bridge company *held* taxable as real estate, 77 C 314
- listing property to "Heirs of" A is improper, 79 C 630
- water power "used by its owner"; water power "leased by its owner," 80 C 486
- purchasing, cutting and selling standing timber is a trading or mercantile business and taxable; where such business is carried on; election of taxpayer in listing it, 82 C 266
- cash of foreign company, actually in this State, received from sale of goods, is taxable though company is in hands of ancillary receiver, 82 C 406
- cash is not within the statute taxing property of manufacturing company; the average amount of goods on hand during previous year shall control, 82 C 406
- on question whether vendor or vendee must finally be responsible for taxes, where lessee pays taxes as part of rent, 84 C 178
- summer cottages erected by lessees can be taxed as property of the owner of the land, though landlord considers them personal property of the lessees who erected them, 85 C 6
- as between landlord and tenant, proper to tax buildings of tenant in landlord's list, 85 C 6
- reservoir dam is not assessed separately from land on which it stands, 85 C 120
- mains and pipes of water company in highway, on private land under perpetual right of way, or on municipal land, are not assessable as land, 85 C 120
- incorporeal rights are not taxable under our statutes, 85 C 120
- taxation of easements, 85 C 127
- one is liable for tax on real estate in his name though condemnation proceedings are pending, 88 C 73
- record owner on October 1st is liable for taxes in Hartford, 88 C 73
- that a lessee listed property as his own is not an admission against the owner, 90 C 570
- in case of fire district, taxing power is confined to value of goods actually within the district, 92 C 672
- taxation of excess in the amount of a mortgage above the assessed value of the mortgaged real estate, 100 C 93
- an easement is not taxable apart from its dominant estate, 101 C 383
- water mains, title to which was vested in property owners' association by reason of advances made to pay for extensions but which on their refund were to be reconveyed to company, *held* property of association under conditional sale, and not taxable against company, 107 C 520
- interest in real estate is taxable only against record owner, that is owner of fee and not leasehold, 107 C 697
- lease for nine hundred and ninety-nine years is regarded as fee, not one for sixty-four years, 107 C 697
- effect of provision in lease that lessee would pay all taxes lessor might have to pay, particularly as regards assignee of sublease, 107 C 697
- assessment against lessee, contrary to statute, cannot be validated by Legislature, 107 C 697
- particularly where effect would be to single out certain lessees contrary to statute and prevailing practice, 107 C 697
- real estate under lease and sublease for long term not assessable in name of sublessee although lease provides lessee shall pay taxes, 108 C 246
- property not listed against person legally bound is "omitted" from list though listed against another, 108 C 246
- land held for life or term of years by gift or devise is taxable to tenant, but not where based on consideration, 109 C 388
- statute providing for taxation of lands of particular owner leased under certain provisions to lessees void as class legislation, 109 C 388

inclusion in property to be taxed of that in one district served by extension of sewer from another district, without change in district boundaries upheld, 112 C 543

taxpayer who knew layout of district, bill authorizing it, etc., and had constructive notice of boundaries by map on file, but made no claim its property was not within district, while four years taxes were being assessed, *held* estopped from doing so now, 122 C 392

where district is formed to include property which is not and cannot be benefited directly or indirectly and will pay taxes only for benefit of other property, there is act of confiscation violative of due process clause, 122 C 392

—not so where though there is no present benefit it is reasonably probable one will accrue, 122 C 392

—though only present function of district was to supply water which defendant already had, property might be included where district had power to take watershed, provide sidewalks, drains and sewers, and more sanitary living conditions for defendant's workmen would result, 122 C 393

A's wife who constituted husband agent for purpose of filing tax lists on real estate they owned together, cannot avoid responsibility because of his listing property as belonging to himself individually, when it belonged to them both, 123 C 543

§ 11. —Matters of Procedure and Form; Validity

tax may be valid though voted on a list not then fully perfected, 7 C 547

failure to lodge abstracts on day appointed invalidates, 7 C 550

failure of town clerk to transmit abstract does not invalidate the lists, 7 C 556

what must appear on face of a legal assessment list, 10 C 130

—every article must appear legally subject to tax, 10 C 130, 14 C 72

—list not to be explained or corrected by parol, 10 C 131

statute de powers of board of relief construed, 14 C 72

houses and lots appurtenant, when to be separately designated in list, 15 C 456

list must be act of the board, not of a single assessor, 18 C 189

—tax levied on list made by one assessor, *held* invalid, 18 C 189

list valid as to realty, may be invalid as to personality, for insufficient description, 23 C 148

—under statute of 1849 assessors had no right to amend the whole at threefold valuation, 23 C 154

irregular attestation to list *held* waived by acceptance, 23 C 148

defect in list *held* waived by voluntary payment, 23 C 401

illegal alteration by assessor presumed to be malicious, 27 C 221

assessors liable for altering assessment list after lodgment with town clerk, 28 C 201

grand list is the only record of assessors' doings, 30 C 394

—is not perfected until passed upon by board of relief, 30 C 394

item changed by town clerk to more appropriate head does not thereby invalidate list, 30 C 394

property of nonresidents to be placed in separate lists, but failure does not invalidate assessment list, 30 C 402

if inseparable portion of assessment illegal the whole is illegal, 35 C 563

what degree of accuracy in individual lists is required, 39 C 178

informal oath to assessor *held* insufficient, 41 C 206

particularity requisite in describing property, added, 43 C 309

assessment list *held* sufficiently certain; need not appear that stock listed is not exempt, 43 C 309

additions to assessment list; what certainty required, 44 C 478

—money added under head "Additions \$ —," *held* sufficient when, 44 C 478

one listing separate pieces of land as one item cannot complain if they are assessed as a whole, 48 C 243

real estate must, by New York law, be assessed and taxed in name of owner or occupant, 51 C 10

—tax not so assessed is void and not an "incumbrance," 51 C 10

mandamus lies to compel separate valuation under statute, 54 C 75

assessors need not have definite knowledge of specific property unlisted, in making additions to list, 54 C 437

—nor need they actually value the same, 54 C 437

—all they are bound to do is to inquire and form an honest belief in the matter, 54 C 437

—item in list added by, "all taxable property not specifically mentioned \$25,000" *held* proper, 54 C 437

an item in list made by assessors, "insurance stocks, \$81,763," *held* not insufficient as not specifying the companies, 58 C 269

failure of assessors to give statutory notice of additions made by them to tax list is waived by taxpayer's appeal to board of relief, 73 C 294, 85 C 6

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reassessment and appraisal, under special act, in New Haven; each piece of property to be regarded separately, 73 C 543, 646

voluntary appearance before board of relief is a waiver of want of notice, 75 C 590

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description "Plant of Electric Light Company" held sufficient; description of property, "same as last year," 76 C 169

notice of increase in valuation by assessors, 76 C 169

list need not contain valuation; right of assessors to examine list of previous year; presumption of regularity in their action, 76 C 172

tax list filed and sworn to by a stranger as agent, inadmissible to prove taxpayer filed list; admissible if agency is shown, 81 C 639

assessors can advise with a nonresident committee in putting value on property, but must use own judgment, 83 C 494

assessors' memorandum, without taxpayer's assent, that he had a life use, is not an admission by him, 84 C 169

failure of assessors to notify taxpayer as to addition to list is waived by appeal to board of relief, 85 C 6

notice must be given of increased assessment of taxes, 85 C 6, 87 C 230

where board of relief led taxpayer to believe that the sending of one member to his house was equivalent to appearance before full board, it could not later assert the contrary, 90 C 154

designating one of a board of relief to go to a taxpayer's house is not a delegation of their powers, 90 C 155

powers under statute authorizing correction of "clerical omissions or mistakes," 102 C 206

assessors cannot change assessment after it has been revised by board of relief, 102 C 206

assessors have no power to compromise pending tax litigation; nor is city bound by their compromise under principle of ratification or estoppel, 102 C 206

power to correct errors in assessment outside of statute, 102 C 210

taxpayer must make "separate description of each parcel of real estate"; reference to document other than map on file in town clerk's office not permissible, 103 C 149

where taxpayer merely lists property "same as last year" assessors are justified in treating it as failure to file tax list and in making out list themselves, 103 C 149

taxpayer entitled to notice when omitted property is to be added to his list, but not

when valuation is to be increased over that of preceding year, 103 C 149

taxpayer must appear in person before board of relief and offer to be sworn in order to obtain reduction of assessment, 103 C 149

nature of power given board of relief to make a supplemental list of property omitted from list, 103 C 607

—word "may" to be read as "shall" or "must," 103 C 607

—mandamus lies to compel listing of property of ecclesiastical society leased for profit, 103 C 608

—that action not determined till after time law allows for act compelled does not bar remedy, 103 C 608

—owner not a necessary party, 103 C 608

—duty to determine amount of valuation discretionary, 103 C 607

assessors in adding property to list must describe parcels separately as statutes require, 104 C 542

assessors may be compelled by mandamus to follow statutory rules for listing and placing value on property, 104 C 542

purpose of requiring individuals and assessors to list and value each parcel separately, 104 C 542

statute requiring oath of assessors to abstract of lists is mandatory; but form of oath merely directory and slight verbal deviation does not invalidate lists, 104 C 579

owner's valuation not a necessary part of list, nor is it covered by oath; admissibility in evidence, 106 C 423

authority to agent to file list does not authorize him to put on value, 106 C 423

lists may be altered by boards of assessors before completed and filed, 108 C 246

assessors may be compelled to list each parcel separately and value it at its "actual value" as required by statute, 108 C 246

hearing before tax commissioner de listing and assessing taxable property of town; functions of commissioner; not an adversary proceeding; assessors not parties as in civil case; commissioner entitled to exercise similar powers to grand jury, 117 C 306

—and it was within his discretion to examine one assessor while others were excluded from hearing though admitting other members of public, 117 C 301

—assessor not justified in refusing to be sworn or to testify, 117 C 301

burden as to furnishing facts upon which valuations are to be based is upon property owner, 117 C 388

assessors not bound by inaccurate specification of dimensions of lot in list; not required to resort to map filed in town clerk's office or search land records, 117 C 395

breach of duty by assessors may be of such nature as necessarily to affect entire grand list, such as failure to obey a mandatory statutory requirement, 122 C 218

—but error which affected only particular individual can be adequately remedied by him by appeal to board of relief, 122 C 218

—to justify invalidation of entire list, errors in method of valuation of individual properties must be such that levy of tax on list would be likely to produce substantial injustice to community as whole, 122 C 218

method used by assessors in using data collected by service company, and in finally determining valuation, *held* inadequate ground to invalidate entire list, 122 C 219

—appropriate method by aggrieved taxpayer was appeal to board of relief, 122 C 219

giving written notice of any increase in valuation of personal property over list filed by taxpayer or list of previous year is for protection of individual taxpayer, 122 C 219

—failure to give such notice would not invalidate list as whole, 122 C 219

if provision in tax assessment statute is inserted for protection and information of taxpayer, compliance with it is necessary condition precedent to legal tax, 122 C 393

—if it is merely mechanical and directory an irregularity does not invalidate tax, 122 C 393

—where there had been a violation of mandatory provisions of statute as regards portion levied on, district entitled to recover balance after deducting portion improperly assessed, 122 C 392

assessors had authority under validating act to remove property from tax list of A and place it on that of A and his wife, 123 C 543

assessors not bound to inspect locus in order to supply deficiencies in description given in tax list, 125 C 597

property properly listed in name of the estate where estate had not been distributed, 128 C 551

court justified in finding assessments made and liens filed on property as described in lists in spite of variations; in view of provision of Practice Book that certificate of lien shall be prima facie evidence of validity, 128 C 551

injunction against raising assessment in future could not be granted because assessors must take into account changed conditions, 128 C 670

§ 12. —Valuation

where assessors adopt rule of valuation conflicting with statute, remedy is by appeal to board of relief, 43 C 309

assessors' valuation is subject to review by board of relief only, 43 C 309, 48 C 145

husband handing in list for wife is not an agent to bind her as to valuation, 62 C 331

valuation by assessors *held* inadmissible to prove actual value in a suit between other parties, 62 C 332

assessment should conform to statutory requirements as to valuation; questionable whether courts can enforce any other rule, 63 C 18

comparison of assessments of similar property of different owners, *held* admissible on appeal for a disproportionate assessment, 63 C 22

—otherwise, if property is dissimilar, not adjacent, and method of valuation different, 63 C 22

an excessive assessment differs essentially from a disproportionate one, 63 C 23

appeal alleging assessment above fair market value; relief on ground that assessed value was disproportionate will not be granted, 63 C 79

relief allowed where assessors adopted rule of half of market value and assessed certain party for more, 63 C 321

—where appellant in appeal fixed certain sum as a just valuation, *held* court might take this sum instead of half the market value, 63 C 322

court will not reduce the valuation below that given in by owner, 63 C 321, 65 C 465

valuation of manufacturing plant for purposes of taxation; "market value" implies what, 99 C 329

—"present true and actual valuation"; the rule where there is no "market value," 99 C 329

—how such "actual valuation" is to be determined, 99 C 335

—inventory and appraisal by taxpayer, when inadmissible as evidence, 99 C 330

—judgment erroneous because omitting item of fixed equipment of plant, 99 C 330

—finding as to market value *held* to have been made without evidence, 99 C 330

there is more than one way of fixing value of manufacturing plant, 102 C 212

valuation of property for taxation is a matter of approximation and judgment, 102 C 212

lands suitable for house lots, though not so listed, may be so valued, 103 C 149

valuing property by capitalizing rentals of many years back is violation of law requiring assessment of actual value, 105 C 542

fair market value discussed, 105 C 581

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valuation of land according to its suitability for building lots, *held* proper, 106 C 229
owner's valuation not required, 108 C 125

assessment of 75 per cent of real value by board of relief when board of assessors used 100 per cent would result in inequality and discrimination, 115 C 578

—but where result reached by this erroneous method was actually correct, taxpayer is not aggrieved, 115 C 578

taxpayer should seasonably take available and proper means to ascertain whether valuation is correct, and if it is erroneous resort to appeal, 117 C 394

earnings or income producing capacity, as distinguished from actual earnings are factor for valuation, 119 C 5

—but actual rental may be important element, 119 C 5

—and if percentage used in capitalizing gross income is sufficient to cover deductions allowable in producing net, this method may be used, 119 C 5

—trial court *held* justified in using 10 per cent and in regarding capitalization thus arrived at as important though not sole consideration, 119 C 5

fact that property is under lease is relevant, and if for long term, important consideration, 119 C 5

average earnings for reasonable period should be taken rather than income for taxing year or current year, 119 C 5

—prospective as well as present and past earnings are important element and any immediate prospect of increase or decrease should be considered, 119 C 5

—so evidence that plaintiff had agreed with lessees for reduction in rent called for by lease to begin shortly after taxing date was erroneously excluded, 119 C 5

—but ruling not prejudicial as even so average figured over period before and after taxing date and capitalized would show only slight variation from assessors' figures, 119 C 5

variation of \$840 in property assessed at \$66,840 too inconsequential to show mistake or abuse of discretion by assessors or to justify interference with large discretion of court, 119 C 5

whether a computation capitalizing the estimated income from a hypothetical building most advantageous to the location might be proper method, *quaere*, 119 C 10

evidence of financial results of business of lessees properly excluded, 119 C 13

—profits and losses not evidence of value, 119 C 13

admission of evidence of insurance carried harmless, as value found was less than this amount, 119 C 13

where actual value of real estate not ascertainable, proper to use other methods in determining "fair market value"; reproduction cost less depreciation and obsolescence, capitalization of gross income, capitalization of "stabilized net income," 122 C 228

—court not bound to base valuation on latter to exclusion of other methods, 122 C 229

determination of value is expression of court's opinion aided ordinarily by expert witnesses, and reached by weighing these opinions in light of all circumstances and its own general knowledge of elements, 122 C 228

in action to collect tax, cannot contest valuation, 123 C 543

property may be found to have market value in absence of other sale of like property in open market, 125 C 172

—definition of market value, 125 C 174

—whether the other sales are evidence of amount of such value presents different question, 125 C 175

value at time of assessment is to be taken; that price was depressed at that time nil sig., 125 C 172

assessment of factory in Middletown; sales of similar properties within six months in Milldale and Hartford admissible; whether irrelevant because of remoteness within discretion of court, 125 C 172

valuation of property by assessors is discretionary matter and cannot be controlled by mandamus, 128 C 647

judgment reducing assessments was *res adjudicata* as to value of property at that time, particularly in view of discrepancy in valuation given by experts testifying in present trial, 128 C 669

—finding of referee that no material change in values during period in question sustained, 128 C 670

§ 13. —Appeals

omissions and mistakes can be taken advantage of only by those in whose lists they occur, 15 C 447

where assessors adopt rule of valuation conflicting with statute, remedy is by appeal to board of relief, 43 C 309

nonresident whose personal property is wrongly assessed waives no rights by neglect to apply to board of relief, 47 C 477

where by act of Legislature a board in a city, which had both town and city government, was made a city board, *held* right of appeal still existed, where limits of city and town were co-extensive, 62 C 441

—not required to be chosen at town meeting under Constitution of Connecticut, 62 C 445

taxpayer may be aggrieved by a valuation in excess of the fair market value of his property, 63 C 21

—or by a valuation exceeding the local standard adopted by the assessors, 63 C 22

—in the latter case there may be a difficulty in applying a remedy on appeal, 63 C 22

—especially where the grievance is that others were assessed lower, though complainant's assessment conformed to statute, 63 C 22

appeal by wife with husband; husband prosecuting appeal after death of wife; town may show valuation placed upon property by wife to rebut testimony of husband, 63 C 24

relief on appeal on ground that assessed value was disproportionate, 63 C 79

court will not reduce the valuation below that given in by the owner, 63 C 321, 65 C 465

Superior Court may on appeal reduce a disproportionate valuation so as to conform to local, though improper, rule of assessors, 63 C 324

nature of appeal; when party is aggrieved; taxing double or triple costs, 65 C 456, 69 C 606

evidence as to adoption of rule of fractional valuation, admissible, 65 C 461

limits of power of Superior Court to change valuation, 65 C 461

tenant by curtesy in possession proper party to appeal; remainderman misjoined; demurrer lies, 67 C 272

form of appeal; plea in abatement must point out defect, 72 C 329

appeal does not suspend running of interest; suspension of action on tax, 72 C 599

different shareholders affected alike may join in one appeal, 73 C 288

appeal from taxation of shares of stock, as regards deductions of real estate; allegations, 73 C 288

appeal waives failure to give notice of increase in valuation, 73 C 294

special act as to revaluation in New Haven; unconstitutional as regards provision for appeal, 73 C 543, 646

appeal to be disposed of on equitable principles, 75 C 283

burden of proof is on appellant, 75 C 281

appeal where no appearance made before board of relief, 77 C 108

appeal fails, on payment of tax under circumstances not permitting a recovery; voluntary payment, 78 C 675

mere difference in opinion as to value, not sufficient basis for relief on appeal, 80 C 491

on a tax appeal property may be added to appellant's list by court, 83 C 493

by appeal, one waives defect of failure to give notice of increase, 85 C 6

appeal will not lie because assessors, in absence of a list, misjudged acreage; where it is alleged that land contains one hundred forty acres more or less, and assessors put it in as one hundred seventy-five acres, it does not appear that one was taxed on more than he owned, 89 C 435

appeal, under 1915 act, from corporation tax is remedial and independent of other provisions of the act; permits review of all proceedings de novo, 92 C 200

one upon whose property the assessors put an excessive valuation, which the board of relief erroneously refused to reduce, is aggrieved, 99 C 332

municipal corporations are prohibited from revising assessments after appeal to and revision by board of relief, 102 C 217

upon appeal from board of relief, Superior Court performs double functions, partly judicial and partly administrative, 103 C 149

right of appeal from doings of assessors does not supplant remedy of mandamus to compel assessors to properly list property not listed by taxpayer, 104 C 542

whether State may appeal from doings of assessors, *quaere*, 104 C 542

to appeal from board of relief, town is proper and necessary party, 107 C 697

—where lessee appeals from tax on land against him instead of owner of fee, whether latter can claim it exempt under statute of charitable uses, *nil sig.*, 107 C 697

appeal not demurrable because no specific grievance stated where grievance is fairly deducible, 109 C 358

—that property of another is omitted increasing appellant's burden of taxation, 109 C 358

—nor is appeal demurrable because no specific prayer for relief where inclusion of omitted property is clearly desired, 109 C 358

—such omission good ground of appeal, 109 C 358

—but owner of omitted property is necessary party, 109 C 358

—he may be brought in after appeal taken, 109 C 358

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§ 20. Succession and Transfer Taxes

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—provision in will that inheritance and transfer taxes should be paid out of residue and not charged against beneficiaries, was not intended to include prior transfers inter vivos, 122 C 109

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—federal estate tax, though computation included value of property passing under the trust, not included in provision authorizing trustees to pay charges “arising thereunder,” 124 C 67

—and though testator might have placed burden of part of this tax on trust fund, will showed no intention to do so, 124 C 67

—executor could not claim reimbursement from trust fund for payment of any part of this tax, 124 C 67

—by provision in will testatrix did not have in mind state succession tax upon trust fund, and this is tax which falls within provision authorizing trustees to pay taxes “arising hereunder,” 124 C 67

—executors must pay this tax in first instance but are entitled to reimbursement from trust fund, 124 C 68

—amount thereof will be total amount taxed against beneficial interests in trust fund as determined by tax commissioner, 124 C 68

—executors not entitled to reimbursement from trust for any portion of state estate tax, 124 C 68

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—statutory power given state banks to act as agents for tax collectors contains necessary implication that their authority applies only to ministerial acts, 128 C 552

—such bank has power as agent to sign and file certificates continuing tax liens, a ministerial act, 128 C 552

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ent ownership of debtor in alcohol which was attached, and where title had not passed to it attachment could not stand, 129 C 655

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where levy was on land for one tax, but land was sold for all taxes unpaid, deed is void; mortgagor can have it set aside without tendering taxes due, 87 C 142

mortgagee only bound to redeem from taxes whose lien on land is valid, 87 C 142

statute allowing one year to redeem property sold for taxes does not apply where sale was illegal and void, 87 C 143

alias warrant issued for sale of plaintiff's property on 1930 list; supplemental alias warrant issued for taxes on 1931 list before latter were due; *held* no justification for sale of plaintiff's property for collection of taxes on 1931 list, 121 C 246

in majority of jurisdictions, in case of sale of land for taxes, if amount of taxes for which it is sold exceeds amount legally due, sale is void, 121 C 250

—but in instant case (personal property) there were no bids except for property as whole and none was sold that would not have been sold had only taxes which were legally due been called for, 121 C 246

—and sale not invalid because of attempt of collector to include taxes of list of 1931 in sale, 121 C 246

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—this not an illegal abatement of taxes, 97 C 629

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assumpsit to recover tax paid, will not lie if tax be equitably due, though illegally collected, 30 C 395

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—no defense to mandamus to compel action in accordance with law that official has already acted illegally, 108 C 246

—nor that other officials, as board of relief, have ruled that their action was legal, 108 C 246

taxpayer need not wait until actual force or duress is used to compel payment but may pay under protest and sue for recovery, 115 C 554

—but payments made not under mistake, fraud or duress or under protest are not recoverable, 115 C 554

—tax voluntarily paid cannot be recovered under later claim that act imposing it was unconstitutional, 115 C 554

bank failed to claim deduction for taxes on property which were clearly deductible under statute; *held* omission not mistake of fact or law but due to inadvertence or forgetfulness; no refund allowable, 117 C 196

one paying taxes voluntarily cannot recover them back though they were in excess of amount he should have paid, 117 C 388

—threat of levy, enforcement of onerous penalties, or other coercive circumstances characterizing payment as not voluntary, 117 C 392

to recover back taxes voluntarily paid for mistake, it must be that of taxing officers and not made by taxpayer, materially contributed to by him, or attributable to his own neglect of some legal duty, 117 C 388

—not only knowledge of mistake but failure to use accessible means to acquire it may bar recovery, 117 C 388

assessors valued lot for five years on basis of one hundred twenty-five foot depth whereas it was only seventy-three; in lists owner described it as fifty feet deep, misdescribed boundary and put down no owner's valuation; *held* chargeable with contribution to mistake and negligence in not investigating valuations; no refund permitted, 117 C 388

recovery of taxes paid to escape penalties stands upon peculiar ground in which public policy has large place, 124 C 95

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—no warrant for appeal in any other case than one where amount of tax has been so fixed by commissioner, 124 C 404

—so where plaintiff paid tax in September, 1936, on income then thought to be taxable but determined not to be so by judicial decision in March, 1937, it had no appeal from refusal of commissioner to grant refund, 124 C 404

State should not retain tax to which it is not legally entitled, though taxpayer has no remedy, 124 C 409

where payment made voluntarily, right of recovery back depends on mistake of fact of taxing officer, not contributed to by taxpayer, or attributable to his neglect of duty coupled with knowledge or means of knowledge, 125 C 593

taxpayer's lack of care in describing property and failure to resort to available means to check area and subsequent failure to inspect city records which would have disclosed overassessment barred recovery back, 125 C 593

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—latter procedure designed to act directly on valuations of property on grand list while former is directed against collection of illegal tax, 128 C 647

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—so plaintiff by mandamus was not entitled to correction of grand list to conform to judgment in action brought under former statute finding valuation excessive, 128 C 647

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—plaintiffs had demand in nature of debt due which would have been outlawed by Statute of Limitations; could not get around defect by bringing action for declaratory judgment, 129 C 278

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TAXICABS

See AUTOMOBILE; PUBLIC UTILITIES COMMISSION

TEACHERS

See PENSIONS; SCHOOLS AND SCHOOL DISTRICTS § 6

TELEPHONE AND TELEGRAPH COMPANIES

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—loss of revenue to H Company which supplied service to Huntington not confiscatory, 118 C 71

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—contract between S. N. E. Company and H Company de lease of equipment, use of former's lines, etc., could not excuse S. N. E. from performing its public utilities obligations, 118 C 71

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TENANTS IN COMMON

§ 1. IN GENERAL

2. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF COTENANTS

3. RIGHTS AND LIABILITIES AS TO THIRD PERSONS

See also JOINT TENANCY; PARTITION; WILLS § 35

§ 1. In General

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—the fact that the parties are tenants in common does not affect the right of recovery by one, for his portion of crops sold, 55 C 405

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a debtor conveyed property to cotenant who conveyed to debtor's wife; *held* no consideration, 81 C 116

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—his interest is taxable as gift taking effect in possession or enjoyment on death, 111 C 165

one who has title by foreclosure to part of tract and one who has mortgage on another part of same tract not tenants in common; each has separate interest in part of it, 116 C 253

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—even if this estate is recognized here it does not differ from tenancy in common as far as right to possession of property is concerned, 119 C 233

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§ 1 Tenants in Common

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§ 2. Mutual Rights, Duties and Liabilities of Cotenants

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—mortgagee of cotenant need not be joined, unless in possession, 25 C 137

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—in a peculiar case equity might interfere, by requiring security or transferring possession, 27 C 355

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tenant making necessary repairs on property can recover his share of expense from cotenants, 50 C 256

contribution between; expense must be for benefit of common estate; cotenant liable only for benefit to his interest, 52 C 262

statute de sale by court, applies only in cases of ownership; mere interest is insufficient, 60 C 374

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actual, open and exclusive possession with a claim of right by one tenant, is adverse as to other cotenants, 62 C 79

—and where tenant enters under a warranty deed purporting to convey the whole estate, the presumption is that he holds under deed as exclusive owner, 62 C 79

right of majority to control, 76 C 295

liability of each to contribute to expenditures for benefit of estate, 79 C 273

in action for accounting, defendant can prove, under a general denial, that he erected a building on the common land at his own expense; all equities to be considered, 82 C 424

improvements made by husband on land held in common with wife *held* not a gift to her, 82 C 424

a cotenant of the equity purchases an outstanding mortgage on their common land; *held* he need not proceed to an action for contribution, but is subrogated to the rights of the mortgagee, 85 C 379

equity does not permit one tenant in common to buy in outstanding title or incumbrance to the prejudice of the other, 85 C 379

a tenant in common who buys a mortgage holds it in trust for other tenants, but they must contribute their equitable share within a reasonable time or the purchaser may enforce his rights against the others, 85 C 379

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action by one to recover for money spent on property is like statutory action for accounting, 110 C 651

—this action lies between any cotenants, though they are husband and wife, 110 C 651

—and all equities are to be regarded, 110 C 651

—if improvements not made with intention to claim credit, presumption is that other tenant was to have title without contribution, 110 C 651

—rule applied where husband had sole use of property for eight years and gave no support to wife who had left him, 110 C 651

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where tenant in common sued for accounting of “moneys collected as rents” by cotenant who “acted as manager” of property, action was for rents actually received, not for sum representing fair rental value, 118 C 12

—and court concluded by committee’s figures where finding not attacked, 118 C 12

ouster will not be presumed from mere exclusive possession of the common property by one cotenant, 118 C 16

—it is necessary to prove actual ouster, 118 C 16

at common law cotenant in possession was not chargeable by his cotenant for use of the property, 118 C 17

—his occupancy presumed to be his own, 118 C 17

—unless he was bailiff for cotenant he could appropriate all rents and profits, 118 C 17

—this defect in law met by statute, 118 C 17

when tenant in common buys in an outstanding adversary claim to the common estate he is regarded as holding it in trust for all cotenants who seasonably contribute their share, 122 C 406

—failure of cotenant to offer to contribute within reasonable time, prejudicing purchasing cotenant, will lose for him right to benefit by purchase, 122 C 406

where plaintiff and G owned mortgaged property which was foreclosed and plaintiff redeemed, it was *held* on facts that G and purchaser of his interest after redemption by plaintiff did not abandon their interest in it, 122 C 406

—and though G paid none of the carrying charges for three years and made no contribution toward the redemption, there was no laches cutting off her interest as there was no prejudice to plaintiff who became subrogated to mortgagee’s rights, 122 C 407

—while court’s conclusions that plaintiff’s only remedy was by foreclosure against property and that she was not entitled to declaratory judgment were erroneous, ruling was not reversible error as broad judgment for defendants afforded sufficient answer to plaintiff’s claims, 122 C 407

—and while statute de lis pendens prevented purchaser from G from acquiring any greater rights than G, it did not render deed from her null and void, 122 C 407

cotenant’s right to demand or make contribution is equitable; where his title is confirmed by acquiescence and lapse of time it is on doctrine of laches, 122 C 410

§ 3. Rights and Liabilities as to Third Persons

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—may recover against one who has no title, 3 C 191, 7 C 572, 31 C 145

—though suing as surviving partner for land of partnership, 31 C 145

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TENDER

See also CONTRACTS § 33; PAYMENT; SALES § 5; VENDOR AND PURCHASER

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Tender

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See LANDLORD AND TENANT § 10

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THEFT

§ 1. IN GENERAL

2. INFORMATION; EVIDENCE; PROCEDURE

§ 1. In General

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- word "outhouse" in statute, construed, 4 C 448
- theft may be committed of "goods, wares, and merchandise," 4 C 449
- in prosecution for theft, court will not award treble damages to owner, 6 C 105
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- bailee opening and converting contents of package *animo furandi* is guilty of theft, 29 C 49
- aliter, if whole package be taken entire, 29 C 49
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 —if one takes it knowing it is mislaid, it is larceny, 89 C 564
 if one originally took mislaid property innocently, but later became aware who owned it, but fails to return it, it is larceny, 89 C 564
 fact that property was mislaid implies means at hand to find owner, 89 C 564
 taking of property without felonious intent is not theft, 95 C 34
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 —but where he secured deed to real estate and it was intended that title should pass under it, he was not guilty of theft of deed, 115 C 540
 where accused received in New York liquor stolen in Connecticut and then transported and concealed it in Connecticut they were guilty, 119 C 29
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 one in possession of stolen property could not ordinarily assert any claim to it as against owner, 121 C 188

§ 1 Theft

—principle does not require that where possessor has acted in good faith he cannot assert claim to parts added to automobile which are his own, 121 C 188
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—general verdict finds allegation of value true, 83 C 286
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guilty knowledge on part of one receiving stolen goods can ordinarily be established only as an inference from other proved facts and circumstances, 119 C 29
—may be so inferred if circumstances are such that honest man should have come to that conclusion, 119 C 29
—jury may consider conduct of accused then and immediately preceding, 119 C 29
—*held* jury justified in drawing inference that accused knew that liquor they bought was stolen and aided and abetted crime and were accessories, 119 C 29
recent possession of property known to have been stolen raises presumption of theft, 124 C 661
—which exhausts itself when substantial countervailing evidence is produced, 124 C 661
—when not produced jury may draw inference of guilt, 124 C 661
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THIRD PARTY BENEFICIARIES

See CONTRACTS § 45; PARTIES § 5

TIME

§ 1. IN GENERAL
2. COMPUTATION

See also SPECIFIC PERFORMANCE § 5

§ 1. In General

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—in determining, all facts, conversations, etc., regarded, 81 C 343

delays by railroad as affecting reasonable time for delivery of goods, 81 C 573

if one waives condition that building shall be finished within certain time, it may be finished within a reasonable time, 82 C 428

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option to buy land must be exercised within reasonable time, if no time mentioned, 92 C 563

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§ 1 Time

time is of essence of option contracts, 107 C 469

—rule not wholly applied to option to re-new lease, 107 C 469

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§ 2. Computation

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law disregards fractions of a day, 3 D 67, 11 C 24, 18 C 26

—aliter, if precise time is important for justice, 3 D 67, 5 D 162, 11 C 24

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—so also day of act from which time is to be computed, 18 C 26, 19 C 382

—whether in case of instruments or statutes, 19 C 382

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writ dated “June 12,” returnable “June next,” means June of the next year, 10 C 566

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where check made payable on day subsequent to date thereof called for payment on a Sunday, check was payable on day preceding, 14 C 366, note

Sunday is not counted a day for performance of a contract, 18 C 31

—but intervening Sundays count in computation, 18 C 31

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—aliter, if parties’ intent be thereby defeated, 43 C 60

notice of town meeting five days inclusive before meeting is to be held means five days inclusive of day on which notice is posted but exclusive of day on which meeting is to be held, 51 C 22

adjournment of meeting of school district “to Wednesday evening at 8 o’clock” means the next Wednesday evening, 52 C 45

day includes the whole twenty-four hours; the law rejects all fractions of a day, 62 C 411

when last day falls upon Sunday or holiday, a notice of appeal filed on following day is seasonably filed, 90 C 714, 91 C 383

in absence of facts, law will not assume any distinction as to time when two acts are alleged to be done on the same day, 91 C 320

general rule for computing time excludes day upon or from which required act is to be done, 100 C 81

—this day may be varied by settled practice, intention of parties, or terms of statute, 100 C 81

rule that, in computing time, day upon or from which act to be done is excluded applies to all kinds of instruments, statutes and rules and orders of court, 100 C 81

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in calculating periods for filing notice of intent to sell retail business and within which attachment is binding, day of recording instrument to be excluded, 103 C 744

ten-day period for appeal begins with notice to appellant of entry of finding and award, 104 C 351

where certificate of benefit for employees provided that employer might revoke at any time and employee died on same day notice of revocation was given, he was permitted to recover, 116 C 357

rule that fractions of day not recognized will not operate against right and justice, 116 C 357

—fractions of day will be regarded when necessary to save rights, 116 C 357

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where court opened judgment on same day appeal was filed and it did not appear which first occurred, no occasion to inquire whether after appeal taken court could open judgment, 119 C 70

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TITLE AND OWNERSHIP

- § 1. PROOF OF TITLE
- 2. PASSAGE AND ACQUISITION; VESTING
- 3. PRESUMPTION OF POSSESSION FROM TITLE
- 4. TITLE SEARCHER
- 5. MISCELLANEOUS
- 6. —Personal Property
- 7. —Real Estate

See also ACCESSION; ADVERSE POSSESSION; BOUNDARIES; CLOUD ON TITLE; GIFTS; LAND RECORDS; POSSESSION; SALES § 9

§ 1. Proof of Title

title by execution how proved, 2 R 521
 is not presumed merely from possession and payment of money, 4 C 102
 record of probate distribution when inadmissible to show title in severalty, 4 C 495
 what is sufficient evidence of title to recover damages for failure to purchase as agreed, 7 C 291
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 possession is prima facie evidence of ownership; acts and declarations of such possessor when admissible, 18 C 306
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 effect of possession given to one as lessee with right to purchase personalty, 29 C 51
 —lessee cannot confer title on pledgee, as against lessor, 29 C 51
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 —creditor cannot always assume that debtor is the owner of all personal property in his possession, 57 C 386
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 parol evidence inadmissible to support a claim of title to land, but is admissible in action of accounting on its sale, 81 C 433
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 in fraudulent conveyance there is no presumption that owner of legal title owns the equitable, 83 C 110
 title alleged in complaint and admitted in answer is taken as true, 83 C 204
 speech and common understanding of neighbors not enough to establish title, 83 C 500
 plaintiff in ejectment must prove his title; chain of deeds as prima facie case, 84 C 570
 to prove title by possession, all acts of ownership by plaintiff and his predecessor in title are admissible, 85 C 160
 —declarations of predecessor not admissible unless they accompany acts, explain, characterize, or qualify them, 85 C 160
 wife presumed to have equal title to building erected by husband on their joint land, 86 C 200
 lease and use of premises as proof of title, 86 C 263
 where question of title comes up incidentally, proof by deed is not required, 86 C 264
 a will may be introduced as evidence of title to real estate, 86 C 281
 will of nonresident not evidence of title until probated here, 86 C 699
 ownership of personalty is question of fact to which a witness may testify, 97 C 181
 title by lost grant not established by acts of ownership and possession alone; they are only secondary or corroborative evidence in support of other more direct evidence such as reference in existing deed to a lost deed, 103 C 332
 in determining disputed titles, nature of property and of parties claiming ownership is of great importance, 103 C 332

§ 1 Title and Ownership

having failed to prove his own title plaintiff cannot question that of defendant, 112 C 152

upon prima facie proof of title by plaintiff, burden of showing contrary rests on defendant, 112 C 166

filing tax lists and map, and paying taxes, are admissible to prove title but not conclusive, 112 C 167

letters giving broker authority to pledge, sell or otherwise dispose of securities are evidence of power given him rather than transfer of title to him, 115 C 540

possession not material with respect to passing on existence of either legal or equitable title of land; nor as to incidents of equitable title, (dis.) 120 C 404

finding as to title to land on which trespass was claimed to have been committed, sustained, 124 C 386

possession under deeds more than thirty years old sufficient evidence of title, 125 C 390

—sufficient to show constructive possession by proof of title and absence of actual, exclusive possession by another, 125 C 330

§ 2. Passage and Acquisition; Vesting

title vests in party from whom value of goods converted is recovered, 1 R 146

—such party may maintain book debt if goods come into original owner's hands, 1 R 146

mere finder of tree of bees on another's land gains no title, 1 R 209

bees leaving hive may be followed and reclaimed, if known, 1 R 209

creditor acquires only such title by execution as debtor had, 1 C 470

title to personalty vests in executor or administrator of deceased person, 4 C 347, 32 C 288, 51 C 521

title is not revested by return and cancellation of deed once delivered, 4 C 550, 5 C 263

—though such deed be unrecorded, 5 C 263

sale by mortgagor of chattels in possession to bona fide purchaser vests title, 5 C 197

to transfer title by execution, statute requirements must be strictly followed, 7 C 229

title of creditor levying on husband's interest in wife's land, *held* terminated by divorce, 8 C 541

lessee under lease made in pursuance of town vote acquires legal title, 10 C 544

title once vested cannot be divested by disclaimer, 13 C 83

bank stock sold on execution requires conveyance from the officer, 14 C 99

title is transferred to defendant by judgment in trespass, 24 C 490

title to note of intestate vests in administrator, but a bona fide assignee would secure good title, 32 C 288

no title passes by bill of sale to third person, no knowledge, authority, assent, or ratification of sale being made, 34 C 169

owner may lose title by personalty becoming inseparably connected with defendant's realty, 37 C 233

manure in heaps on public street is regarded as abandoned by owners, 37 C 500

—one raking it into heaps is the owner as against person then taking it, 37 C 500

title to island emerging in navigable waters vests in State, 39 C 382

title vested in assignee or receiver by law of another State; property not attachable here by creditor of the company, 45 C 126

—such title once vested should be held legal here, 45 C 126

title to nonexisting chattels contracted for, does not pass until delivery, though payment be made in advance, 48 C 306

mortgagees releasing portion of land sold under agreement with owner of equity so to do, are not bound to release whole, 50 C 262

—though release of whole is necessary to give satisfactory title to purchaser, 50 C 262

—purchaser by tender of purchase money and filing caveat gains no equitable title, 50 C 262

adverse title cannot be obtained by occupation under agreement, 55 C 378

where commercial correspondent advances purchase money and takes possession of property he becomes the owner, 57 C 352

—though advancement and purchase was at the request and for the ultimate use and profit of another, 57 C 352

—and though there is an agreement to transfer upon performance of conditions precedent, 57 C 352

—and though ownership be taken solely to protect advancement, 57 C 352

—so *held* where draft with bill of lading attached was drawn against goods, 57 C 352

—delivery of bill of lading *held* symbolical delivery, 57 C 352

where one derives title through deed of trustee, that beneficiary had no knowledge of it of no moment in absence of proof that trust instrument required such knowledge, 76 C 295

title to offspring of a female animal follows that of dam, 81 C 101

title to land devised to a wife during widowhood vests on death of husband, 81 C 218

by agreement, title was to remain in plaintiff until a sum was turned over; *held* this condition must be fulfilled, 81 C 268

title to note, belonging to wife married before 1877, vests in husband, 81 C 415

- assignee of an unpaid mortgage note acquires equitable title to the security, 81 C 415
- if court must find whether property is principal or income, title does not vest until this is determined, 81 C 510
- land received under a parol gift, if held fifteen years, establishes title, 81 C 539, 82 C 437
- no title is obtained by a quitclaim never knowingly executed and without consideration and under which no claim was ever made, 83 C 347
- deed from one without title is valueless, 83 C 386
- executor has no title to real estate, only a right to possess it, 85 C 245
- acceptance of a bequest of stock passes title, 86 C 463
- title to land abandoned by early proprietors is in the State and becomes common or undivided land, 88 C 8
- title to beach between high and low water in State, 88 C 8
- title to a building, in course of construction, is in contractor, 89 C 118
- taking of note and mortgage as security does not give title to it, 90 C 41
- title may be obtained to an easement by prescription, 90 C 241
- a legal title in stock is created when it is delivered to transferee and so registered on corporation's books, 90 C 342
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- legal title of personal property on death of owner passes to executor or administrator, 90 C 561
- title by descent is cast on recipient by operation of law, 91 C 12
- title in intestate realty vests in children subject to dower, 91 C 12
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- distribution of intestate realty does not create a title in distributee nor change title by descent into one of purchase, 91 C 12
- title to building erected on land of A by B is in A, in the absence of any agreement to the contrary, 91 C 12
- trustee in bankruptcy takes same title his bankrupt had, 91 C 354
- payment of instalments on land under a written agreement creates an equitable title therein, 92 C 693
- deed made by one insane or under undue influence does not in reality convey legal title, 93 C 366
- title to land under legislative authority *held* to pass at time of acceptance and deposit of money, not before, 95 C 1
- decree of foreclosure should provide for vesting of title in one redeeming, 95 C 1
- completed sale divests one's title, 95 C 713
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- title by equitable estoppel arises only where there is an intended deceit or gross negligence amounting to constructive fraud, which has misled, 96 C 346
- cannot arise where parties have knowledge or equal means of knowledge, 96 C 346
- specific devisee derives title and right to possession directly from will; certificates of distribution and devise merely clarify land records, 103 C 352
- title to real estate vests in distributees immediately on death, subject to debts and expenses, 109 C 456, 538
- title to real estate sold by receiver *held* not invalidated by irregularities in procedure, 111 C 605
- judgment vesting title in church which was voluntary association ineffective to vest such title, 113 C 696
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- title will not pass under a deed executed by a stockholder of corporation, as such, 114 C 42
- mortgagee need not join as party to foreclosure a grantee who has not recorded his deed, 114 C 88
- obtains good title against any such, to which his assigns though with notice succeed, 114 C 88
- legal title to real estate passes to beneficiary at decedent's death; of personal property not until distribution; until then his right is equitable, 115 C 127
- conditional vendor, on repossession of car, takes only such title as purchaser had in after-acquired detachable equipment, 115 C 187
- doctrine of title by accession does not apply to equipment of car which buyer and seller do not intend to be merged in its structure, such as tires, 115 C 187
- title to money paid to conservator of veteran under World War Veterans Act passes to veteran, 115 C 326
- not entitled to priority where bank in which it was deposited fails, 115 C 326
- when relation of bank with depositor of checks or drafts for collection is that of debtor and creditor as distinguished from bailor and bailee or principal and agent for collection, 117 C 407
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§ 3 Title and Ownership

§ 3. Presumption of Possession from Title
personal property regarded as in the constructive possession of general owner, if not in actual possession of any one, 7 C 271

—so *held* of title to lost property, 22 C 158
every owner of personalty is presumed to have possession, 21 C 597

title draws possession to itself when, 65 C 527, 71 C 555

possession presumed from proof of title, 78 C 116, 81 C 442

owner of legal title is in constructive possession of land if it is not shown to be in possession of another, 82 C 653

one who has no record title to land cannot have constructive possession, 112 C 152

binding contract for sale of real estate confers equitable title; possession by husband and wife presumed to be that of the one having title, 112 C 431

mere paper chain of title does not establish ownership unless possession is shown, though title satisfactorily established may draw with it possession in absence of evidence to contrary, 118 C 137

while title to particular tract draws possession with it, general possession of tract will not avail as regards any particular piece of land unless it is shown to have been a part of that tract, 119 C 282

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duty of one searching title and giving certificate; incorrect statement breach of undertaking; no duty on other party to investigate facts, 111 C 537

certificate of title stating lien to be incumbrance *held* breach of undertaking where lien was invalid, 111 C 537

questions of qualified title searcher as to location of lot on sketch from descriptions in distribution, proper, 112 C 5

—so as to location of town boundary from study of records, 112 C 5

no duty in title searcher to go beyond records in chain of title, 117 C 558

—only bound by facts as appear in chain of title of particular lot, 117 C 558

—not chargeable with knowledge of any conveyance not in line of record title, 117 C 558

title searcher or conveyancer, in absence of suspicious circumstances, under no duty to investigate genuineness of signature to contradict or confirm title revealed by land records, 126 C 102

town clerk unlawfully practiced law within meaning of statute in issuing certificate of title stating her opinion as to its validity, 128 C 325

—not authorized to act by statute requiring savings bank, before making mortgage loan,

to obtain certificate of title issued by some person approved by it, 128 C 325

§ 5. Miscellaneous

§ 6. —Personal Property

assumption of false position regarding title may work estoppel, 12 C 482

—party *held* not estopped to deny title when, 12 C 482

retaking by force of goods in possession of wrongdoer is lawful, 18 C 2

question of title to personalty is generally one of fact, 45 C 386

—when so far question of law as to be reviewable on facts found, 45 C 386

title of executor or administrator is not sufficient, in equity, against one who has equitable right and possession, unless property is needed for payment of debts, 51 C 521

the law permits ownership for security as well as for profit, 57 C 383

“collateral security” and “additional security” in an assignment, *held* to place no limitations on ownership, 57 C 384

there is an implied warranty of title in sale of personal property, 62 C 160

defunct company need not be revived and made party before setting up title to one of its bonds, 82 C 333

whether title to personal property can be divested by adverse title, *quaere*, 82 C 334

that two assignments of a judgment are made on the same day does not make it impossible to show that title to the judgment is different in each case, 85 C 271

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interpleader does not lie to determine title to separate and independent deposits in different banks, 88 C 157

owner of property, who procures its attachment as property of another, cannot assert his title, 90 C 570

imputing the knowledge of facts to a vendee is not inconsistent with the principle that to affect title of a subpurchaser for fraud of original vendee, former must have had actual knowledge, 91 C 482

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goods sold with warranty of title; where vendor notifies vendee of suit involving title, latter is bound by judgment rendered therein; vendor responsible over to vendee, 113 C 539

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tion clarified by Trust Receipts Act, 129 C 452

§ 7. —Real Estate

contract that one shall not be molested in title to land means legal molestation, 1 R 400

title is not affected by judgment in forcible entry and detainer, 4 C 79

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title to island formed in navigable river is prima facie in the State, 8 C 222

plaintiff cannot impeach the title under which he claims, 10 C 69

title must cover what, if pleaded by defendant to trespass quare clausum fregit, 10 C 322

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president acting for bank cannot deny bank's title, 30 C 34

where equities are equal the legal title prevails, 30 C 34

party cannot recover on express warranty of title and also for fraud, 49 C 331

—electing one remedy he thereby waives the other, 49 C 332

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suit for possession of land; plaintiff *held* not estopped by previous judgment in trespass where title was not in issue, 52 C 21

in general one cannot impeach his own title, especially where others are also beneficiaries, 52 C 371

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title claimed of land of ancestor against heir by virtue of a sale to satisfy debts, must establish fact of debts, and that all proceedings essential to sale were complied with, 62 C 143

husband's curtesy merges in the fee of wife, where both titles are bought by one person, 62 C 144

—special circumstances *held* not to affect the general rule, 62 C 144

averment of title *held* on facts sufficient to support injunction against application of widow for dower, where estate was needed to pay debts and claim of widow clouded title, 63 C 332

purchase from administrator gives privity with intestate, 71 C 571

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one recognizing title in another cannot hold adversely to him, 81 C 547

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cemetery can have legal title in ground though it disposes of right of burial in the land, 83 C 204

want of title in lessor is no excuse for non-payment of rent if he later obtains title, 84 C 420

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Probate Court cannot try title to real estate, 84 C 560

title of devisee under a specific devise is sufficient to maintain an action for the conveyance of land from one who got it through undue influence, 85 C 567

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§ 7 Title and Ownership

- one cannot be silent as to the title of property he is about to convey, 87 C 491
- agreement to arbitrate boundary line is not one for a decision as to title of real estate, 87 C 678
- provisions in a deed authorizing removal of material upon or under ground grants title to it where it lies, 88 C 51
- title not divested for insurance purposes by a conveyance and an immediate reconveyance, 89 C 35
- vendee need not accept anything but a full and complete title to real estate, 89 C 215
- a widow has title as tenant in common with the heirs before the assignment of her dower, 90 C 133
- rights acquired by contract for a deed, and part payment, are not title; attachments of such interest, 90 C 555
- perfected legal title cannot be lost by abandonment, 90 C 558
- paper title to land not sufficient to sustain action of trespass, 90 C 576
- if a charitable organization cannot take title to property left it, it can receive the benefits by appointment of a trustee, 90 C 592
- attaching creditor takes only such title as his debtor had, 91 C 571
- title to property is not essential to an insurable interest, 92 C 1
- mortgagee after debt is paid has only a naked legal title, 92 C 345
- title to land under navigable waters is in the State, 92 C 349
- misrepresentation of title intentionally is fraud, 94 C 219
- a cotenant's deed of the entire property is an assertion of his own title and denial of that of the other, 95 C 619
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- quitclaim deed from mortgagor to mortgagee held not to merge titles where that result prejudicial and not intended, 105 C 169
- title not unmarketable where derived from heirs, though no administration, fifteen years having elapsed, 109 C 452
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- importance of probate to land titles, 109 C 452
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- title by adverse possession sufficient, 109 C 457
- one cannot attack validity of grant as to reverter and at same time rest his own title on the grant, 109 C 529
- one asserting control of property liable for defective conditions though he has no title, 109 C 662
- title, as used in deed, means the right to or ownership in land, 113 C 472
- in action of trespass, possession of plaintiff, even though recent, is sufficient unless defendant can show a superior right; question of plaintiff's title incidental, 115 C 48
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- probate decree accepting account and mutual distribution could not conclusively determine doubtful title to property, 118 C 46
- where land is under contract of sale; equitable title in vendee, legal in vendor, 120 C 390
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- thus in execution of principle that once a mortgage always a mortgage, equity will look behind legal title and if necessary determine rights of parties in disregard of it, 123 C 244
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if one does illegal and wrongful act to injure another, no defense that it was done under void process, 8 C 101

in tort action, if plaintiff fails to prove injury as great as stated he may recover to extent proved, 18 C 494

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—suit against gas company for shutting off gas, 30 C 521

allegation of intent "to injure the plaintiff" not to be taken as formal but as averment of actual intent, making thereby a good complaint, 34 C 384

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unlawful confinement by one person of cattle of another does not make former liable for malicious injury to them by a third person, 52 C 481

that plaintiff suffered injury when engaged in wrongful act does not necessarily bar recovery, 59 C 1, 76 C 201, 96 C 666

where plaintiff, suing city for fall on sidewalk, concealed subsequent streetcar accident and recovered damages for both injuries, she is not precluded from suing railway, 72 C 362

action may be founded upon tort unaccompanied by force, but one in question was held to be one to recover damages for injury to personal property and was, therefore, affected by Statute of Limitations applicable thereto, 82 C 578

where debtor fraudulently conveyed all his property to his wife, judgment creditor has remedy at law for damages against both debtor and wife, 83 C 109

distinctive element of wilful or malicious injury, in contrast to negligence, is design to injure, either actually entertained or implied from conduct and circumstances, 83 C 503

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 - breach by lessor of covenant to repair but one phase of question, 119 C 405
 - fundamental nature of obligation the test as to whether action is founded upon contract or tort, 119 C 398
 - instances of physician and patient, lawyer and client, bailor and bailee cited, 119 C 405
 - but liability for negligence arising out of contract relationship not to be narrowed to established relations such as these, 119 C 407
 - negligence occurs where one under duty to exercise certain degree of care to avoid injury to others fails to do so, 119 C 398
 - and action may arise whether there is contractual relationship or not, 119 C 398
 - mere breach of contract would not afford basis for recovery in tort, but necessary elements to establish negligence must be shown, 119 C 409
- nor could such cause of action be based on agreement without consideration, 119 C 409
 - but scope of undertaking may be such that duty to use care may extend beyond promisee to others, 119 C 410
- generally held in other jurisdictions that action in tort cannot be based upon obligation of landlord to repair based on agreement on his part to do so, 119 C 404
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- “C. Rogers & Bro. A. 1,” *held* upon facts not an infringement of “Rogers & Bro. A. 1,” where former correctly represented name of manufacturer, and there was no intentional misrepresentation, 53 C 147
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Trade-marks and Trade-names

- nor with such as so closely resemble those of the first as probably to mislead, 54 C 566
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See REMOVAL OF CAUSES

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TRESPASS

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- 5. TRESPASS TO PERSONALTY
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TRIAL

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See also ACTIONS § 3; CHARGE TO JURY; CRIMINAL LAW AND PROCEDURE § 9; DISCOVERY AND INSPECTION; EVIDENCE, particularly §§ 2, 3 and 94; JURY AND JURORS; PLEADING; VENUE; VERDICT

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- error cannot be predicated upon his refusal to do so, 98 C 283
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- effect of stipulation on trial as to certain fact, 99 C 536
- control of proceedings in courtroom are in discretion of judge, 100 C 64
- methods and priority in trial of equitable and legal issues, 100 C 248
- prior to trial, court may order physical examination of plaintiff on behalf of defendant, 103 C 267
- statute forbidding evidence or arguments after cause has been committed to jury relates only to civil cases, 103 C 455
- rules cannot be entirely disregarded in favor of litigant who conducts his own cause, 103 C 744
- one trial judge not bound by rulings of another earlier in case, 105 C 596, 106 C 475, 115 C 631
- litigant has right to prove all the essential, material and relevant allegations of his pleadings, 107 C 454
- not improper for judge to examine witness, if discretion not abused, 108 C 454
- where on striking out answer of witness, court remarked it was not pleasing to counsel, this not error where court cautioned jury not to infer any intent to criticize counsel, 108 C 454
- rules of court to be liberally applied in favor of party, not an attorney, who tries own case and appeals, 109 C 692
- by statute trial court may hear and determine issues arising under certain counts before trial of issues raised by other counts, 110 C 24
- answer of court to question of jury de letter and spirit of law, 110 C 367
- stipulation in open court to be given meaning which trial court would reasonably attach to it, 111 C 351
- testimony of stenographer at trial should not be rejected; another stenographer should be called, 112 C 530
- no abuse of court's discretion to allow jury to remain while child is being examined as to competency as witness, 115 C 672
- during direct examination of defendant, her counsel asked for conference with judge, and in chambers said he was surprised with testimony and asked if he could cross-examine her, to which plaintiff's counsel acceded; *held* latter could not claim any error, 116 C 674
- judge should be scrupulous to refrain from hearing matters which he feels he cannot approach in spirit of fairness, 118 C 39
- where action of court in opening judgment was erroneous but not void, plaintiff had right to claim case for trial as if no hearing had been held, 118 C 414
- granting of his motion for new trial recognized this right and afforded no basis for appeal, 118 C 414
- sequestration of witnesses rests in discretion of court, 123 C 666
- province of trial court to control proceedings in courtroom; seating of witness, 123 C 675
- permitting further evidence after close of case, 126 C 240 and see EVIDENCE § 2
- trier's right to take into account its observation of demeanor of witnesses is limited to such genuine and spontaneous reactions in courtroom as bear upon credibility to be accorded their testimony, 126 C 258
- matter of having stenographer's notes read at request of jurymen and of submitting copies of them to jury rests in court's discretion, 126 C 484
- colloquy between judge and jurymen in which former stated that under our system it was better that jury's recollection govern, not reversible error, 126 C 484

entire complaint, including allegations of fraudulent conveyance, should not have been submitted to jury which was trying negligence issue only, without caution to disregard them; better course to submit copies with these paragraphs omitted, 126 C 635

in trial to court, trial judge sits as jury, (dis.) 128 C 303

§ 2. Conduct of Parties and Counsel; Examination of Witnesses

error to allow counsel to read decided cases to jury showing facts not inconsistent with sanity in testator, 44 C 40, 59 C 243

standard medical works on insanity may be read to jury by counsel for accused, de his insanity, 46 C 330

—the practice has by repetition become a rule in this State, 46 C 330

—counsel may also read insanity cases from regular law reports, including the facts and comments thereon, 46 C 330

reading to jury of scientific standard books is in discretion of court, when, 59 C 244

—counsel have no right to read to jury from lawbooks, in argument, 59 C 243

statement, in trial to court, that witness had committed perjury in former action, 72 C 202

filing of brief without knowledge of other party ground for new trial, 72 C 202

duty of attorney and penalties for its breach, 72 C 244

reiteration of claim once overruled, discountenanced, 77 C 304

where one of the jury made a remark during the trial approving of what one counsel said to another, court should have rebuked both counsel and juror; new trial ordered, 82 C 258

court can permit counsel to ask if any juror is interested in an insurance company in which defendant appears to be insured, 82 C 272

Supreme Court comments unfavorably on use of epithets in a brief as regards members of the bar, 82 C 442

party knowing of improper conduct of counsel cannot remain silent, and if verdict is unfavorable, then complain, 83 C 702

motion to set aside verdict because of improper conduct of counsel and jury which was known at the time, is addressed to the discretion of the court and will not be reviewed unless abuse is shown, 83 C 702

counsel for one defendant cannot bind the others by his admissions, 84 C 152

statements of attorney in court are admission of client as to facts stated, 86 C 393

right of counsel to call court's attention to mistake in charge, or erroneous assumption of facts, 87 C 291, 93 C 328

attorney who wilfully disregards the rulings and suggestions of the court, rules of court, and the proprieties of the occasion, should be admonished or summarily suspended or disbarred, 88 C 149

court can criticize counsel for not following up cross-examination in which he accuses witness of dishonesty, 92 C 599

use of standard scientific treatises, 96 C 240

reprehensible to ask question for purpose of getting before jury, in an improper way, a former conviction, 96 C 638

remark by assistant to prosecutor in hearing of jury that accused, then a witness, was a perjurer ground for new trial, 99 C 115

reference to "insurance man" in statement attributed to defendant, *held* insufficient ground to declare mistrial, 100 C 64

—jurors must be presumed to know of common practice to insure liability, 100 C 64

parties have a right to be present during entire progress of trial provided their presence and conduct does not disturb orderly progress of it, 100 C 69

—theatrical entrance of injured plaintiff brought in on stretcher with groans, etc., *held* objectionable, 100 C 64

—but discretion of court *held* not reviewable under the circumstances, 100 C 64

counsel does not admit opponent's assertions by failing to deny them, 103 C 537

denial of motion for mistrial involves large discretion not disturbed unless plaintiff's rights injuriously affected, 108 C 191

—reference to conviction of defendant involved in automobile accident of a crime, 108 C 191

improper statement in presence of jury does not necessarily give right to new trial, 109 C 324

—where court promptly characterized it as improper and warned counsel, 109 C 324

mistrial granted for occurrence preventing fair trial, 110 C 60

—various questions asked of witnesses during long criminal trial not of sufficient importance to grant mistrial, 110 C 60

attorney at instigation of court secured release of jurymen from engagement with client; *held* court properly denied motion for mistrial, 113 C 458

display of emotion by plaintiff, executrix of deceased father, *held* not ground for new trial, 113 C 462

statement of witness de insurance during cross-examination *held* insufficient to prejudice jury and require court to order mistrial, 115 C 112

display of emotion by plaintiff, husband of deceased, not such as to require that ver-

§ 2 Trial

- dict, otherwise justified, be set aside, 117 C 478
- improper statement by counsel, not under oath, of material fact pertinent to issues and prejudicial to opposing party, is reversible error unless prejudicial effect has been averted by charge or otherwise, 120 C 486
- must be unsworn assertion by counsel of existence of fact, as distinguished from appeal to jury's recollection of evidence, 120 C 486
 - reversible only when of material fact of potential prejudice and seasonably objected to, 120 C 486
 - when statements of fact may aid in trial, 120 C 491
 - duty of appellate court to weigh effect of statement and action of trial court in dealing with it, 120 C 486
 - no distinction between statements made in argument and those in course of taking evidence, 120 C 494
 - especially true as to latter where importance is emphasized by excusing jury for purpose of motion based on statement, and resumption of trial without further reference to matter, 120 C 494
 - cases reviewed, 120 C 494
- where State's case dependent almost entirely on testimony of S, and defendant sought to discredit S by showing he had been promised immunity for his testimony, statement of state's attorney that no promise of exemption was made *held* reversible error, 120 C 486
- especially as no admonition to disregard statement was given by court, 120 C 486
 - and prestige and confidence pertaining to office, and personal reputation for probity of state's attorney, gave finality to statement making it the more prejudicial, 120 C 486
 - that it was made impulsively and upon strong provocation, *nil sig.*, 120 C 486
- party cannot make evidence for himself by commenting on other's failure to use inadmissible material, 122 C 376
- questions by state's attorney of witnesses as to what part of writing in book marked for identification was theirs, where he had no intention of offering book in evidence and knew it to be inadmissible, not ground for mistrial in view of court's admonition, 128 C 172
- ## § 3. Argument of Counsel
- court may stop argument on claim for which there is no proper evidence, 1 D 313
- failure to prove material point may be taken advantage of on closing argument, 14 C 438
- matter ruled out, **not to be commented upon**, 33 C 471
- order of argument is discretionary with court, 35 C 453
- order of argument when two causes in which parties are reversed are tried together, 36 C 477
- order of argument where each demurs to other's pleadings, 45 C 378
- limitation of time for argument in capital case must be reasonable, 47 C 535
- order of argument for construction of will; party claiming under the will to precede in argument, 48 C 494
- under statute two hours are allowed each party for argument in Superior, Common Pleas and District Courts, 55 C 17
- the time may be divided among counsel as they see fit, 55 C 17
 - refusal of court to allow full time in murder case, *held* error, 55 C 17
- reading to jury of scientific standard books is in discretion of court, when, 59 C 244
- counsel have no right to read to jury from lawbooks, in argument, 59 C 243
- reference to documents excluded on objection, condemned, 68 C 551
- right to argue; absence of opposing counsel, 72 C 207
- wide latitude given to argument; objection must be made at once; discretion of court as to new trial for improper argument, 72 C 252, 74 C 638, 700
- right of counsel to comment on gravity of offense charged and read statute fixing penalty, 75 C 55
- discretion of court in controlling argument, 75 C 55
- extraneous illustrations must not be used to bring in inadmissible facts; discretion of court, 75 C 215
- statement that carriers ordinarily disregard rights of passengers; discretion of court, 77 C 601
- referring to disclosures resulting from examining photograph with magnifying glass, 78 C 677
- commenting in civil action on failure of party to testify, 79 C 267
- in criminal prosecution; waiver, 73 C 95, 79 C 477
- improper argument cured by charge; necessity of objection in trial court; in criminal prosecution, calling attention to indictment of accused, 81 C 27
- reprehensible for counsel to go outside of the record in addressing the jury, 83 C 161
- new trial not ordinarily granted for it, especially if no objection is made below, 83 C 161, 183
- state's attorney's remark that accused evidently could not pay over the money is of no significance, 83 C 449

—that there might be no rebuttal, as accused might not take the stand, not improper, 83 C 449

comment that “defendant acted like any other millionaire” *held* improper, 83 C 466

—not error to proceed with the trial and not set verdict aside as remark was apologized for, 83 C 466

remarks of counsel outside of issue and evidence are condemned, but his punishment should not be visited on his client, 83 C 643

improper remarks to jury must be excepted to at once, 85 C 112

—statements de attitude of both political parties *held* not to have improperly affected jury, 85 C 112

in absence of evidence, this court cannot say verdict improperly influenced by remarks of counsel where no objection made till after verdict and judge cautioned jury, 86 C 100

remarks of counsel that one amassed money by slick and smooth method *held* improper, but no new trial granted, 86 C 415

state’s attorney’s argument *held* not improper, 92 C 658

refusal to permit proper claim to be pressed in argument is error, 93 C 106

argument may be limited to one hour; extension is matter of discretion, 95 C 79

counsel’s reference to the fact that defendant was insured *held* harmless in view of the charge, 95 C 111

remedy for improper argument, 96 C 160, 289

state’s attorney is not only an officer of the court but a high public official, 96 C 160

—must conduct case fairly in public interest, 96 C 160

—must not make comments outside the evidence or comments not based on evidence, 96 C 160

—must not attempt to secure conviction through passion, prejudice or resentment, 96 C 160

use of standard scientific treatises, 96 C 240

disobedience of statute de commenting on refusal of accused to testify does not entitle accused to new trial as of right, 96 C 289

objection to improper argument will be unavailing if not made until after verdict, 96 C 584

improper argument of counsel should be included in appeal, not in motion for new trial, 96 C 584

argument of state’s attorney *held* objectionable and prejudicial, 97 C 260

right of court to interrupt with statement of principles of law he shall charge as applicable to case, 97 C 462

where in action for price of goods defendant disputed price alleged and counterclaimed

for fraud, court could permit him to open and close argument, 100 C 393

counsel should not refer to matters outside of evidence, 100 C 691

—but not ground for reversal, where jury probably not misled, 100 C 691

—and where they were cautioned by court, 100 C 691

when argument is improper, opponent should move for dismissal of jury, and not wait for chance of favorable verdict, 100 C 695

where newspaper accounts of bomb outrage are introduced by one accused of inciting strikers to violence to explain letters he wrote and to affect his credit, improper for state’s attorney to use evidence to indicate an intent on his part to cause violence, 102 C 711

argument of state’s attorney *held* within limits of fair advocacy, 103 C 455

State not held to so strict accountability where accused elects trial by court, 105 C 338

—necessity of objection at time, 105 C 338
where judge cautioned jury, argument *held* not to constitute prejudicial appeal to race prejudice or passion, 105 C 436

failure of trial court to set verdict aside for improper argument to be given weight, 105 C 446

improper argument to jury ground for new trial when harmful, 105 C 521

discretion of trial judge in dealing with improper argument; necessity of prompt objection, 106 C 119

improper for counsel to go outside record and appeal to passion, prejudice or bias, 106 C 119

—new trial rarely to be granted for improper argument particularly if no objection made at time, 106 C 119

—reference to witness as “law perjurer” and “low scoundrel,” 106 C 122

trial court *held* correct in admonishing counsel who strayed away from evidence, 106 C 158

in criminal case reference to prior conviction *held* of no consequence in view of court’s immediate caution and charge to jury as to matter, 106 C 260

statement by state’s attorney that “every red blooded citizen in this State” would enjoy opportunity they had to serve *held* harmless, 106 C 354

proper for court to read statute to jury not relevant to issues, but serving to convert improper argument of counsel, 107 C 562

improper to argue that recovery must be had, if at all, against the defendant named in the action, 107 C 562

§ 3 Trial

question of improper argument not presented by motion to set aside verdict as against evidence, 108 C 285

—how question is to be presented on appeal, 108 C 285

claims impeaching good faith of state's attorney not to be made lightly, 109 C 394

duty to object immediately to improper argument or at least at its close, 109 C 394

remark of state's attorney that he had not promised leniency to and would deal later with confederate of accused who was state's witness not ground of mistrial, 110 C 55

remark of state's attorney not ground for new trial in absence of objection at time, 110 C 55

brief reference to evidence stricken out *held* insufficient to justify new trial, 111 C 527

where a trial court has taken action to neutralize improper argument, new trial seldom warranted, 112 C 658

—usually only when incompatibility of verdict with evidence is so obvious as to signify prejudice, 112 C 658

—new trial may be ordered in rare cases where no objection made at time, 112 C 661

considerations appealing to sympathy, such as poverty of plaintiff are foreign to cause and improper subjects of emphasis or comment in argument, 116 C 74

junior counsel's comment in argument "don't force her (the plaintiff) to become a public charge," in connection with evidence, was improper appeal to sympathy of jury, 116 C 76

argument of counsel that decision adverse to city would impose duty to defend many similar cases not ground for new trial when court charged jury to disregard it, 116 C 148

remark of plaintiff's counsel suggestive that case was being defended by insurance company, not sufficient to disturb verdict where defendant did not move for mistrial but elected to go to jury, 117 C 478

—but deliberate attempt by counsel to create prejudice in minds of jury may justify granting of motion for mistrial, 117 C 478

improper argument *held* not so prejudicial as to warrant reversal where court told jury to disregard excluded evidence to which it had reference, 117 C 600

argument of counsel in claiming that conduct of investigator and his method of obtaining information from plaintiff were unfair, though exaggerated, not ground for new trial, 119 C 235

—and court not justified in setting verdict aside on that ground where it was not

asked to withdraw case from jury, 119 C 241

counsel entitled to claim inference from failure of defendant to obtain physical examination of plaintiff; no further comment by court necessary than that no duty rested on defendant to do so, 119 C 310

language of counsel in closing argument did not so far transcend limits of legitimate argument as to require action by court other than warning that verdict should not be influenced by sympathy or antipathy, 119 C 310

that plaintiff was related to witnesses and counsel and had everything to gain and nothing to lose, not so prejudicial as to require setting verdict aside, where no objection was raised and relationship was proved in testimony, 119 C 390

while privilege of counsel in addressing jury should not be too closely narrowed, it must never be used as license to state or comment upon or suggest an inference from, facts not in evidence, 120 C 494

—where verdict has been influenced thereby it should be set aside, 120 C 494

remark "we are now paying for bankers' mistakes" did not exceed permissible limits of argument, 121 C 201

—particularly where court admonished jury to disregard it, 121 C 201

concerning contributory negligence and assumption of risk, predicated upon evidence admitted for a limited and different purpose, improper, 121 C 316

—but not reversible error as there was no motion for mistrial and in view of court's charge, 121 C 316

motion for mistrial necessary where there is improper argument of counsel, 121 C 322

refusal to grant request for more than one hour for argument *held* not abuse of discretion, 122 C 611

trial court has broad discretion in dealing with improper argument, 123 C 51

—in absence of exception, motion for mistrial, or request to charge, court's response to unwarranted and improper remarks of counsel did not constitute reversible error, 123 C 61

defendant's argument that it was doing favor to truck driver in helping him load did not require that verdict be set aside, 128 C 280

§ 4. Viewing the Premises

personal inspection by judge as evidence, 71 C 652, 85 C 255

trier may make personal inspection of real estate at request of parties; this constitutes evidence, 85 C 255

by jury in negligence cases, *held* not to give them better information than that in printed record, 98 C 303

conduct and remarks prejudicial to losing party in presence of jury while, 99 C 259

—all subsequent proceedings *held* vitiated and new trial against both defendants, 99 C 259

effect of, on ability of court to certify evidence requested, 99 C 709

—inability applies only to points affected by the view, not to everything, 99 C 710

trier's view of premises at invitation of the parties, 101 C 406

action of committee in visiting premises taken for public use furnishes evidence of value, 109 C 212

fact that trial court viewed premises taken into consideration in refusal to correct finding, 114 C 182

where there were structural changes since accident and light conditions could not be reproduced, motion for, properly denied, 114 C 699

trial court's viewing premises after trial in absence of parties not ground for new trial, where parties consented at trial, 114 C 736

statement of counsel *held* to waive right to be present at view of premises, 114 C 737

evidence obtained by, is to be considered as truly as if presented by witnesses; not a substitute for expert testimony, 115 C 168

finding that buildings were not usable and could not be made so which was supported only by view of premises and not by expert testimony, eliminated, 115 C 168

evidence obtained by personal inspection has same effect as that presented by witnesses, 115 C 168

—may dispense with proof as to facts which are apparent on observation, 115 C 168

—but not with proof of matters requiring expert skill and knowledge, 115 C 168

—whether building could be made usable without increasing burden of party wall not determinable by inspection, 115 C 168

evidence obtained by court through personal inspection as to conditions is as truly to be considered by it as if presented by lips of witnesses, 116 C 684

power of court, in its discretion, to order view by jury is generally recognized, 117 C 67

—when judge is tribunal instead of jury, he may do what jury is permitted to do, subject to similar limitations as to notice and opportunity to parties to be present, 117 C 67

—power to be exercised with caution; conditions must be same as at time of accident and personal inspection must be fair

to all parties and reasonably necessary, 117 C 67

where sidewalk was in substantially same condition as at time of accident, action of trial court in inspecting it after notice and invitation to counsel to be present, *held* proper exercise of discretion, 117 C 67

facts ascertained by personal inspection of locus are in evidence as fully as though present through description given by witnesses, 117 C 74

failure of court to examine interior of plaintiff's house and defendant's office when it visited premises not error, particularly as it was not requested to do so, 117 C 244

evidence so obtained may be taken into account in reaching conclusions and making finding, 121 C 88

court's failure to view locus to see whether there was conductor pipe there not error, in view of direct testimony as to this fact, 123 C 157

§ 5. Continuance; Adjournment; Reopening Case

no continuance for want of preparation, 2 R 25, 45

when allowed for absence of subpoenaed witness, 4 D 471

if defendant out of State and attorney does not appear to defend him, suit to be continued to next term, 8 C 115

refusal to adjourn to enable procuring of further testimony, is discretionary, 40 C 363

—so also, granting motion to reopen to receive additional testimony, 40 C 450

by agreement case may be heard after term and judgment rendered as of the term, 43 C 32

continuance and adjournment of suit by foreign attachment against nonresident, before justice, is controlled by what statute, 49 C 453

"not in this state," includes nonresidents in this State, 49 C 455

adjournment may be inferred from files and minutes of justice, 51 C 542

adjournment and continuance before committees are matters of discretion as with courts, 53 C 329

—their action is final in absence of corruption and fraud, 53 C 329

where jurisdiction is by attachment only, with no appearance and no continuance, a judgment at the first term erroneous, not void, 62 C 543

granting continuance of case is matter of discretion, 63 C 18

discretion to reopen case to permit plaintiff to supply defects made basis of motion for nonsuit, 68 C 33

§ 5 Trial

discretion of court in granting continuance and its review, 69 C 186, 75 C 308, 314, 78 C 654, 79 C 380, 81 C 474, 95 C 89

—continuance of argument on motion, because counsel engaged before Supreme Court, refused when, 75 C 308

discretionary to allow a witness to be recalled after plaintiff has rested and court has said it would grant verdict for defendant, 81 C 383

where continuance had been repeatedly asked on account of defendant's illness, trial had been promised, and then another continuance was asked, it was refused, 81 C 474
discretionary with court to open a case, civil, or criminal, after evidence is closed, provided opponent is afforded opportunity to meet the new evidence, 90 C 126, 147

motion to stay proceedings is addressed to discretion of court; denial not error if no facts are found, 91 C 553

arbitrators *held* to have properly refused to reopen case to permit evidence which party had previously declined to offer, 91 C 684

motion for postponement is addressed to discretion of court, 92 C 658

—its action will not be reviewed unless accused is prejudiced, 92 C 658

limiting continuance of trial of case to term after that during which it was commenced, 97 C 554

—continuing on trial thereafter where objection made and overruled not a waiver, 97 C 554

refusal to reopen case, after declining court's suggestion de evidence, upheld, 98 C 176

not error to refuse a continuance to prove a fact immaterial to the judgment, 100 C 1
informalities in adjournment from time to time waived if parties eventually appear and are heard, 104 C 291

continuation of trial, and holding jury, pending illness of juror, *held* proper exercise of discretion, 106 C 703

right of court to finish trial and render judgment at any time prior to close of term or session succeeding that where it was begun, 107 C 380

where complaint in two counts, one on special contract for services and other quantum meruit, at trial latter withdrawn, but after trial ended, court informed counsel that he could give judgment only on it and would hear evidence, defendant had right to cross-examine plaintiff as to value of services, 107 C 380

—court should not have restricted evidence to expert testimony, 107 C 380

—but this *held* not error in absence of request by counsel to proceed, 107 C 380

—evidence offered on original trial properly considered in deciding case, 107 C 380

refusal to grant continuance *held* to have been within discretion of court, 108 C 173
statute concerning continuances in action against nonresident automobilist applies to action begun by service on state official, 113 C 74

reopening case and permitting party to bring brakes into court and offer expert evidence as to them *held* within discretion of court, 115 C 203

there being no provision in statute de service on motor vehicle commissioner for continuances, that subject is controlled by existing statutes, 116 C 646

continuance of trial and rendition of judgment after expiration of term or session, 117 C 639 and see JUDGMENTS

ruling that trial proceed in absence of defendant within discretion of court under circumstances, 118 C 537

three months' continuance ordered by the court may be terminated after finding nonresident defendant had had at least twelve days' notice of pendency of action prior to return day, 121 C 34

within province of court to proceed with case when plaintiff's counsel did not appear at opening of court on second day, 121 C 362

—upon appearance he should have been given unconditional opportunity to cross-examine witnesses who testified in his absence, 121 C 362

—but he is not entitled to reversal because of his refusal to cross-examine when court would not allow him to do so if he took an exception, 121 C 362

—no exception necessary to preserve his rights, 121 C 366

refusal of court to open case during arguments to permit defendant to introduce evidence to discredit testimony of plaintiff, within its discretion, 121 C 480

no statute or rule prevents court, when case is regularly assigned for trial, plaintiff and witnesses appear and defendant fails to appear, from proceeding to hear case, 123 C 487

court within discretion in denying continuance for one day to permit offering defendant's wife as witness, when she was absent having x-ray pictures taken on the day she knew defense witnesses were to be heard, 126 C 257

TROLLEY CARS

See CARRIERS § 10; STREET RAILWAYS

TROVER AND CONVERSION

- § 1. IN GENERAL; WHAT CONSTITUTES CONVERSION
 2. PERSONS ENTITLED TO SUE AND WHO MAY BE SUED
 3. DEMAND AND REFUSAL
 4. ACTIONS; DAMAGES; PLEADING

§ 1. In General; What Constitutes Conversion

trover lies for property tendered in payment of note, though not accepted by plaintiff when tendered, 1 R 55

the taking of A's property on an attachment against B is a conversion, 16 C 346

unlawful taking with intent to convert, *held* a conversion, not merely evidence of it, 19 C 319

—though intent be to convert to another's use, 19 C 319

—use without license and wrongful sale, *held* a conversion, 19 C 319

trover lies, though conversion occur by mistake, and though defendant was not benefited by it, 23 C 233

—and though by concurring negligence of plaintiff, 23 C 233

deed of farm stock, defeasible if grantee impair value; grantee *held* liable in trover for exchange, 24 C 115

—evidence of liability to depreciation inadmissible, 24 C 115

a bona fide purchase from apparent owner in possession is no conversion, 24 C 207

lies for promissory note held as a deposit, 32 C 563

sale to one falsely claiming to be agent of defendants; machinery erected in mill of defendants so as to become realty; *held* no conversion by defendants, 37 C 233

lies for manure raked into heaps on highway, 37 C 500

redelivery to bailor by bailee of money stolen; there must be wrongful intent to aid in depriving owner of his property, 38 C 532

—redelivery to bailor without such intent, *held* no conversion, though bailee knew the property was stolen, 38 C 532

—such bailee not chargeable with the knowledge of the special agent redelivering, 38 C 532

refusal to deliver property not in party's possession or subject to his order, is no conversion, 39 C 406

does not lie against common carrier for merely removing goods from sealed to unsealed car, provided goods are delivered without injury, 39 C 447

lies for death of horse through negligence, though hired and driven on Sunday, 40 C 111

lies for shares of manufacturing stock, 41 C 142

lies to recover property attached as lessee's, if lessor has a right to immediate possession, 41 C 317

sale by assignee in insolvency of consignee, of goods on which consignee has mere lien, *held* a tortious conversion, 44 C 558

sale of stock pledged, after tender of debt; prior unexecuted agreement to sell *held* no defense, 46 C 109

—pledgor's right to sell is not affected by the unexecuted agreement to sell, 46 C 109

sale of ice in defendant's icehouse to plaintiff; defendant covered it with new ice and on demand asserted title; *held* no defense that he was not able to deliver, 61 C 166

conversion does not lie for proceeds of note, where acts with regard to it are authorized and fault is in failure to deliver over proceeds, 64 C 390

seizure of goods under bill of sale given subject to conditions which owner has offered to perform is conversion, 66 C 500

where pledgee of stock, though pledge was not in all respects valid, has transferred title thereto, owner, who has retained proceeds of loan, cannot compel pledgee to pay its value, 76 C 213

sale of pawned articles after day of redemption without notice, 77 C 150

conversion by attachment, 77 C 370

trust imposed on goods converted in hands of administrator of tort-feasor, 78 C 577

does not lie where possession originally rightful has not been converted into a wrongful one, 83 C 159

recovery cannot be had for claimed conversion of a tool house that defendant built on another's land with agreement that title was to remain in defendant, 86 C 536

refusal of lessor to deliver fixtures to lessee, who has surrendered possession because of failure to pay rent, *held* not conversion, 87 C 129

no conversion for transfer of property from pledgee to third party, 90 C 41

where husband manages wife's property, mingles it with his own, etc., he is her debtor, but she must identify particular funds to recover them on basis of her ownership, 90 C 231

no conversion where A receives property from vendee of owner, if owner intended

§ 1 Trover and Conversion

- it to be performance of original contract, 92 C 186
- conversion is an unlawful exercise of dominion over goods belonging to another who is entitled to their immediate possession, 96 C 233
- plaintiff must allege and prove all these elements, 96 C 233
- conversion occurs where one who has purchased stolen automobile refuses to return it unless paid for towing it to its garage, a service never requested by plaintiff, 97 C 402
- ignorance of true ownership is no defense, 97 C 404
- trover lies where bailee fails to return article deposited on demand, 99 C 523
- suit lies for such failure and also for injuries to article by bailee's negligence, 99 C 523
- if article is so damaged as to be useless and not reasonably repairable, action is for conversion; if it may be restored, for the injuries to it, 99 C 523
- which is the true situation is question of fact, 99 C 523
- sale of shoes shipped on consignment only, without consignor's approval, 102 C 38
- conversion defined, 102 C 612
- conditional vendee of theater fixtures, to which vendor had no title, *held* not guilty of a conversion by merely assuming control of truck on which they were loaded, 102 C 612
- where attorney for payee of note, to whom it was sent for purpose of certain trial, with acquiescence of attorney for holder, delivers it to payee without right, 107 C 574
- no conversion if attorney for holder had ostensible authority to consent, 107 C 574
- but where payee gives it back to his attorney, and holder demands it of him, situation is different, 107 C 574
- upon conflicting evidence it could not be held as a matter of law that defendant purchased bonds in good faith, 111 C 178
- the unauthorized assumption and exercise of right of ownership over property belonging to another, to exclusion of owner's rights, is a conversion, 112 C 613
- where seller assigned conditional sale contract and recorded it with assignment, assignee of second bill of sale substituted for original, who took possession and sold car, is guilty of conversion, 112 C 613
- automobile purchased by husband from money turned over to him by wife from his earnings according to agreement *held* husband's property, 113 C 306
- groundless assertion of a right to hold goods is no defense to action for their conversion, 116 C 711
- as where defendant retained wood under claimed lien for storage, 116 C 711
- no conversion by creditor by attachment and sale on execution of contents of store sold in bulk without statutory notice of intent or filing of bill of sale, 117 C 143
- sale or transfer of mortgaged personal property by mortgagor in possession, not reserving rights of mortgagee and without latter's consent, constitutes conversion, 117 C 267
- bank receiving for collection draft with bill of lading attached, under instructions to deliver latter only on payment of draft, is liable in conversion for surrendering bill without collecting draft, 117 C 472
- purported conditional sale in fact constituted a mortgage and was valid between parties though grantor retained possession, 120 C 524
- hence no conversion where grantee took possession where there was default, under terms of contract, 120 C 524
- deputy sheriff who made wrongful attachment guilty of conversion and sheriff under whom and plaintiff for whom he acted also answerable, 121 C 423
- attachment and sale of goods in suit against conditional vendee in possession is conversion as to conditional vendor, 122 C 29
- of bowling alleys by foreclosing mortgagee, 124 C 59
- pledgee of shares of stock has right to have it transferred on books of company and doing so does not constitute conversion, 124 C 201
- nominal transfer of pledge which does not put property beyond control of pledgee does not amount to conversion, 124 C 201
- if pledgee without authority wrongfully buys in the pledged property the pledgor may repudiate transaction, 124 C 201
- such a sale when repudiated is not conversion where no change has occurred in actual condition and situation of property, 124 C 201
- authority of agent to trade in car purchased for him by employer, 124 C 693
- recoupment in diminution of freight charges, on ground that carrier converted goods by failing to collect charges on delivery of goods as instructed by consignee, denied, 125 C 242

§ 2. Persons Entitled to Sue and Who May Be Sued

- trover is maintainable against stranger, by second mortgagee of chattels in possession, 15 C 302
- trover is not maintainable by lessor of chattels during the term, 15 C 384
- what necessary if lease is at pleasure of the parties, 15 C 384

lies against both attaching officer and party, without demand, when, 17 C 155

aiding and abetting principal actor renders equally chargeable for conversion, 19 C 319

—also one advising and assisting, when, 19 C 319

trover lies by mortgagee, on absolute sale by mortgagor of chattels mortgaged to secure debt due on demand, 23 C 70

lies against purchaser from lessee with an unexecuted power to purchase, 24 C 427

does not lie against a bona fide vendee of fraudulent purchaser, 39 C 406

—whether party may not recover on tender of sum paid, *quaere*, 39 C 406

—refusal on tender of sum paid, which was inadequate, *held* strong evidence of bad faith, 39 C 406

plaintiff setting out special title cannot rely on mere possession, 43 C 320

—as that possession was acquired in consideration of lien, 43 C 320

attachment and delivery of goods to creditors of fraudulent vendee, with latter's assent; officer *held* not liable in trespass or trover to vendor, 46 C 389

—though officer took bond of indemnity from attaching creditors, 46 C 389

where one who is creditor of deceased executor's estate holds certificates of stock standing in executor's name, against demands of administrator d. b. n., latter, after presenting claim against executor's estate on ground of their conversion, cannot have trover against party first named, 64 C 26

where attaching officer brings trover against defendant, latter may prove title in another, 65 C 193

execution purchaser under void sale not having taken actual possession cannot have trover against one wrongfully in possession, 65 C 516

—cannot sustain action, where it appears that property did not belong to judgment debtor, 66 C 306

present right of possession will support, 79 C 342

one who consents to transfer of pledged property cannot maintain conversion against pledgee, 90 C 41

if vendee resells property to A and vendor delivers it to A, vendor cannot sue A for conversion, 92 C 186

joint liability of principal and agent for conversion by latter, 97 C 402

a corporation may be liable for trover, 97 C 403

one having general property in a personal chattel who has never had actual possession may sustain action against a stranger, 99 C 589

wife estopped to claim ownership of property sold in her presence by her husband with her knowledge and acquiescence, 101 C 449

—her conduct as effectual to transfer her title as though she signed bill of sale, 101 C 449

—she could not later bring action for conversion against vendee's attaching creditor, 101 C 449

where plaintiff conveys real and personal property to S reserving right to reconveyance upon paying certain advances and defendant takes goods by assignment from S, 101 C 457

basis of bailee's right to recover from third person for conversion of bailed property is right of possession and special property in goods, rather than express or implied consent of owner, 129 C 386

where third party wrongfully took goods being shipped by common carrier, pendency of suit by owner against carrier did not preclude recovery of full value of goods in action of conversion by carrier against third party, 129 C 386

§ 3. Demand and Refusal

demand and refusal is no foundation for action of trespass, 5 C 490

demand and refusal is sufficient evidence of conversion, 5 C 493, 16 C 71, 34 C 398

—though property was then at a distance, 34 C 398

—but is not itself a conversion, 5 C 493

unqualified refusal of officer is prima facie evidence of a conversion, 16 C 71

no demand required if the taking is tortious, 16 C 83, 346, 40 C 222

—taking by attachment issued against another is tortious, 16 C 346

—officer *held* entitled to information from party demanding the property, 16 C 84

lies against both attaching officer and party, without demand, when, 17 C 155

a bona fide purchase from apparent owner in possession *held* no conversion, 24 C 209

—such purchaser not liable until demand, 24 C 210

participants in fraudulent purchase *held* liable without demand, 25 C 486

after proof of demand and refusal, other evidence of conversion is admissible, 34 C 398

where neither party is in fault a demand is necessary, 37 C 242

an absolute and unqualified refusal of party having possession, to deliver to owner on demand, constitutes conversion, 61 C 166

—if a party has a lien, or is not able to deliver, the refusal must be put on that ground, 61 C 166

—otherwise it will have the effect of an absolute refusal, 61 C 166

§ 3 Trover and Conversion

- demand and refusal as evidence of wrongful detention, 66 C 550
- proof of, does not preclude proof of earlier actual conversion, 77 C 370
- proof of demand and readiness to pay charges, met by refusal, where goods left for repairs, is sufficient, 77 C 394
- may be shown under allegation of conversion by sale, 78 C 198
- slight evidence of, may be sufficient, 79 C 81
- absolute and unconditional refusal to deliver on demand, essential to action for conversion, 98 C 94
- finding of such refusal, on evidence, *held* not unreasonable, 98 C 94
- in trover, demand and refusal must be proved when taking was tortious, but not when original taking was rightful and not followed by wrongful user or dominion, 102 C 612
- right of agent or bailor to time to make inquiry when demand is made by person claiming superior title to article, 107 C 574
- demand for return of converted note not necessary under circumstances, 107 C 582
- where goods originally in rightful possession of person are wrongfully detained by him without exercise of dominion over them, demand and refusal afford necessary evidence of conversion, 116 C 711
- efforts made by plaintiff to remove wood on land sold defendant, with refusal of latter to let him enter premises, serve requirements of rule, 116 C 711
- in action for conversion of stolen property which has been purchased in good faith, or in replevin of it, demand and refusal before suit must be shown, 121 C 188
- but while defendant is entitled to such demand this is not element of owner's cause of action and latter need not allege it, 121 C 188
- filing of general denial does not raise this issue, 121 C 188
- demand and refusal sometimes prerequisite to maintenance of action, 121 C 194
- in general they constitute proper evidence of conversion where one has come rightfully into possession of goods, 121 C 194
- but not necessary in case of wrongful taking or use of goods, 121 C 194
- demand for return of property wrongfully attached not prerequisite to suit, 121 C 429
- conversion cases in two general classes, those where the possession originally wrongful and those where it is rightful, 124 C 201
- second class is where possession, originally rightful, becomes wrongful by reason of wrongful detention, or wrongful use of property or exercise of unauthorized dominion over it, 124 C 201
- in last two groups of this class no demand for return of property required, 124 C 201
- in first group there can be no conversion until possessor refuses to deliver up property on demand, 124 C 201
- unexplained, refusal is evidence from which a conversion may be found, 124 C 201
- where corporation to whom plaintiff was indebted took over stock in it pledged to secure indebtedness, no conversion where plaintiff did not offer to pay the notes, 124 C 202
- plaintiff required to show demand for return of the stock accompanied by offer of payment, 124 C 202
- where possession, originally rightful, becomes wrongful by reason thereafter of wrongful detention, there being no act of conversion, demand is necessary before suit for damages, 125 C 651
- as where tenant quit possession when its lease terminated but made no demand from landlord for fixtures installed by it, 125 C 651

§ 4. Actions; Damages; Pleading

- rule of damages is value of property at time of conversion, with interest, 12 C 473, 26 C 389, 483, 46 C 109
- rule of damages in trover by second mortgagee in possession, 15 C 302
- action against two; plaintiff cannot prove distinct conversion by each, under one count, 15 C 399
- trover and trespass are concurrent remedies if taking is tortious, 16 C 367
- damages *held* not reduced by fulfillment of condition to pay grantor's debts, 24 C 115
- damages are not reduced by attachment of the goods fraudulently obtained, 25 C 486
- expenses of litigation *held* not to be included, 26 C 389
- if property is returned, damages to be for detention only, 26 C 483
- judgment in trover without satisfaction, does not pass title to defendant, 45 C 144
- an unsatisfied judgment against A is no bar to action against B for subsequent conversion, 45 C 144
- judgment against B should be for the full value of the goods, 45 C 144
- first attachment invalid; second, valid; damages given only for first taking, 45 C 504
- no set-off against judgment in, for taking property exempt from execution, by statute, 45 C 566
- rule of damages is strictly matter of law; exceptions are only in nature of mitigation of damages, 46 C 113
- damages for conversion of stock is the market value at time of conversion, 46 C 114
- quaere, as to whether highest intermediate value can in any case be the rule, 46 C 114

—special damages are not recovered by reason of a contract to sell stock at higher than market rate unless such stock was not then procurable in market, 46 C 115

in action on bond substituted for attachment in suit for conversion report of committee in original suit *held* admissible, to show fact of judgment, 53 C 458

—but not to show value of property at time of attachment, where obligors were not parties and report showed value at time of conversion only, 53 C 458

plaintiff cannot recover for injury to goods prior to conversion, where complaint is for conversion simply, 63 C 486

gist of action; pleading, 64 C 390, 68 C 470, 79 C 81

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treating action as trover, in arresting body and on demurrer, will not prevent one from later treating it as in contract, 68 C 459

where trustee exchanges bonds without authority, beneficiary retaining those received in exchange must apply them to amount of damages, 74 C 443

effect of variance between pleading and proof as to time of conversion, 77 C 370

general description of money converted is enough; pleadings considered, 81 C 268

amount recoverable for wrongful conversion of household furniture, 86 C 264

action for concealing and converting a model of a patent claimed by the plaintiff to belong to him through a contract, rests on tort, not the contract; amount of damages recoverable, 87 C 74

damages actual not face value of securities unless no evidence of actual value, 90 C 41

a case that is purely technical is not basis for punitive damages, 90 C 41

measure of damages when usable property has been wrongfully detained, 94 C 481

damages on conversion of notes, bills or other choses in action, 96 C 233

—general rule is, actual value of goods converted at time of conversion, with interest, 96 C 233

—hence allegation of execution of nonnegotiable notes to plaintiff's intestate, unlawful obtaining of possession of them and detention of them by defendant and demand by plaintiff with refusal by defendant, is insufficient as failing to allege plaintiff's right as to immediate possession, 96 C 233

bailor's right to abandon article to bailee, who has rendered it worthless, and sue for conversion, 103 C 685

damages for conversion by bailee fixed by contract if any, otherwise by market value, 107 C 99

complaint setting up failure to return note as agreed treated as one in conversion, 107 C 574

damages for conversion of article in action by one having special property ordinarily full value, 107 C 574

—but if defendant is general owner or in privity with him damages are value of special property, 107 C 574

—one holding it as security entitled to debt for which held, 107 C 574

damages for conversion of bailed article are value at time of conversion with interest, 107 C 712

—value determined by contract if any, if not, by market value, 107 C 712

—consignment of goods for sale, consignee to pay consignor certain sum for any article not accounted for, 107 C 712

damages in general, 109 C 117

—rule permitting recovery where article has no market value or has peculiar value not applicable to conversion of automobile, replaceable in market, 109 C 117

—damages where plaintiff held automobile under conditional bill of sale, 109 C 117

purchase of property in New Jersey contrary to its bulk sales statute was conversion; creditor may sue purchaser here, 112 C 58

measure of damages is value of goods at date of conversion, 112 C 613

—but where assignee of first bill had recovered something on claim against receiver of assignor, this was properly allowed to reduce damages, 112 C 618

execution leviable upon body is allowed upon judgment for conversion, 118 C 158

—as where complaint alleged defendant appropriated property to own use given him for specific purpose and judgment treated action as one for conversion, 118 C 158

—and joint judgment for both plaintiffs imported finding that joint ownership existed at time of conversion, 118 C 163

in action for conversion of stolen property which has been purchased in good faith, or in replevin of it, demand and refusal before suit must be shown, 121 C 188

—but while defendant is entitled to such demand this is not element of owner's cause of action and latter need not allege it, 121 C 188

—filing of general denial does not raise this issue, 121 C 188

TRUSTEE PROCESS

See GARNISHMENT

Trust Receipts

TRUST RECEIPTS

where credit company paid money to automobile distributor for car delivered to dealer who executed trust receipt to credit company to account for proceeds of sale, no improper retention of possession by dealer, 116 C 487

—if trust receipt was acknowledged and recorded as conditional bill of sale, right of credit company was superior to receiver of dealer, 116 C 487

freedom of buyer “in the ordinary course of trade” for “new value” from trustee, from entruster’s security interest; discussion of quoted phrases and application to sale from automobile distributor to subdealer, 125 C 626

in trust receipt transaction at common law entruster perhaps had a qualified title; situation clarified by Trust Receipts Act, 129 C 452

TRUSTS

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- 28. ESTABLISHMENT AND ENFORCEMENT OF TRUST
- 29. RIGHTS OF CREDITORS; SPENDTHRIFT TRUSTS

NOTE: Cases dealing with charitable trusts are listed under CHARITIES; cases dealing with perpetuities, under PERPETUITIES; cases peculiarly appropriate to the title WILLS are listed there though they may arise out of a trust, such as those involving general rules of construction (WILLS § 9), remainders (WILLS § 40), gifts to a class (WILLS § 43), suits for construction (WILLS § 52), but in general, cases involving trusts and trustees are listed here though arising out of a testamentary trust; cases involving allocation of property received to principal or income are listed under LIFE TENANT AND REMAINDERMEN.

See also ANNUITIES; TAXATION § 22

§ 1. In General

trusts are peculiar subjects of equity jurisdiction, 8 C 455, 52 C 74

trustee cannot change his trust relation without consent of cestui que trust, or court of equity, 12 C 127

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trust is not purged by property passing through one without notice, 35 C 165

one repudiating the trust and settling the estate is liable for interest, 35 C 169

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executor is liable for interest on trust funds, under what circumstances, 49 C 519

acts of trustees de facto are binding so far as other parties are concerned; rule applied to savings bank, 52 C 330

where trustee was acting as counsel for cestui que trust prior to the trust, relation of counsel and client is not regarded as interrupted, in absence of evidence of contrary intention, 56 C 284

—where mere naked trust and trustee was counsel of cestui que trust, *held* rule had no application, 56 C 284

“trust” and “trustee” are not, of legal necessity, of unvarying meaning or measure, 56 C 302

—when trusteeship is a matter of contract, the contract with its attendant facts and acts is, as to its character and extent, the law of its being, 56 C 302

estate being in settlement here in Probate Court, that court alone had jurisdiction, 58 C 223

—duty of that court to keep property in its control until distribution, 58 C 223

—and a foreign trustee of nonresident beneficiaries could not secure custody of their portions, under statute, 58 C 233

where an interpretation of will is necessary to determine liability for violation of trust, Supreme Court will remand, 58 C 355

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Statute of Limitations is a defense, when, 59 C 157

—when not a bar, 59 C 158

trust period of fourteen years; *held* to begin after a sufficient time for the settlement of the estate, 63 C 299

—not essential that such settlement should be the final accounting, 63 C 299

—it would not be assumed that such settlement could be delayed for seven years, 63 C 299

one who makes bona fide purchase of trust property is not affected by notice subsequently acquired, 65 C 554

personal liability where one signs as trustee without authority, 71 C 207

note reading “We, trustees,” etc., *held* not to be personal note, 75 C 683

where one takes title by deed from trustee, notice of it to cestui not necessary, unless by terms of trust, 76 C 296

distinction between executor and trustee, 77 C 74

trust to invest and pay over proceeds is an active trust, 77 C 214

one who purchases bona fide, or gives credit in reliance on trustee’s apparent ownership, takes free of trust, 79 C 292

where trust changes, but trustee and funds remain the same, no delivery necessary; but possession is, 80 C 111

innocent depository of trust funds not liable for use of them as trustee directs, 80 C 460

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acceptance by Probate Court of an account, approved in New York, showing money received and deposited but not charged, *held* not an adjudication that one was still an ancillary trustee in New York, 82 C 33

—whether Probate Court could have so decided, *quaere*, 82 C 33

executor should not hold an estate and administer a trust; he should settle the estate, 85 C 245

equity can protect trusts under any circumstances; fund of a mutual benefit association, 88 C 681

right of holder of railroad bonds secured by a trust mortgage, on foreclosure, 90 C 34

trust for life of wife and daughter or survivor, then to next of kin, is an active trust, 90 C 63

Probate Court’s general power over trustees not limited by statutory provision regarding filing annual account, 92 C 286

jurisdiction of Probate Court over trust fund continues until the approval of final account, the ascertainment of those who take the trust property and the return of the distribution has been filed and accepted, 92 C 286

Probate Court’s jurisdiction over testamentary trusts is limited, exclusively statutory and largely of recent origin, 93 C 402

—has only such implied powers as are necessary to the exercise of its jurisdiction, 93 C 402

Probate Court can construe testamentary trust to enforce its execution; cannot pass on its validity or whether it should be terminated, 93 C 402

a testamentary trust which imposes conditions on enjoyment of testator’s bounty is not a dry trust, 93 C 403

Statutes of Limitation do not run against an open, continuing, and acknowledged trust, 96 C 326

§ 1 Trusts

effect of transfer of property from estate to testamentary trustee where executor and trustee are the same, 98 C 478

legal capacity for one named trustee to take property may be secured by subsequent legislation, 100 C 513

powers of Probate Court over testamentary trusts are concurrent with equitable courts, 102 C 97

—trusts *inter vivos* are entirely in jurisdiction of latter, 102 C 97

Statute of Limitations does not run against beneficiary of trust, until trust relation ceases, 104 C 169

equitable right, such as trust, takes precedence over claims of creditors who did not rely on property sought to be charged, 104 C 665

principle that where estate with definite legal incidents is created later attempt to curtail them is void does not apply to trust, 105 C 261

declaration of trust by owner of property who was to hold it for himself and others and develop and sell it, all to share profits and expenses in certain proportion, 106 C 684

—all were under obligation to pay proportionate share of mortgage assumed by him, 106 C 684

effect of declaration of trust in land situated in another State determined by its law, 106 C 684

right to receive income is property; its situs is domicil of beneficiary, 107 C 1

validity of acts of foreign fiduciary not determinable here, if they may have been adjudicated elsewhere, 108 C 611

where partition by creators of trust would defeat its object, it will be refused, 110 C 516

—sale under trust not equivalent of sale in partition, 110 C 516

where trust in land was declared, building subsequently erected on it becomes subject to it, 110 C 522

payment to trustee in mortgage *held* to discharge maker as against holder of note when mortgage authorized this method of payment, 112 C 223

—trustee *held* to be in dual position of trustee for the mortgagor and noteholder, 112 C 227

complaint seeking to have defendants declared trustees is equitable and no jury trial can be demanded upon incidental or subordinate issues of fact, 113 C 594

in suit brought against person in individual capacity, judgment cannot be entered against him as trustee, 116 C 160

term “liquidation” as meaning the realizing by a trustee upon assets and apportioning them to discharge of ascertained liabilities, as in winding up a corporation, 116 C 624

decree that trustee sell real estate, made without issue being before court or application for sale, and where trustee not a party, void, 120 C 77

right of noteholders under mortgage, beneficiaries of trust, to information as to identity of the other noteholders, 120 C 322

—beneficiary entitled to obtain from trustee all information as to trust and its execution for which he has reasonable use, 120 C 322

—rights analogous to stockholders with regard to inspection of corporate books and papers, 120 C 322

—stockholder has right to examine books and records at reasonable times, provided purpose is germane to interest as stockholder, proper and lawful in character, and not inimical to interests of corporation, 120 C 330

—right of inspection necessarily includes access to information as to identity of other stockholders, 120 C 330

—so where noteholders under mortgage sought names of other noteholders for purpose of laying before them plans for taking over property, trustee was required to furnish them, 120 C 323

Statute of Frauds does not extend to trusts arising by operation of law, 121 C 158

eventualities must be adapted to terms of trust, not the trust to the events, 125 C 646

analogy and distinction between actions by executors, administrators or trustees seeking construction of wills and trusts and actions for declaratory judgments, 128 C 18

—former constitute invocation of equitable power of court to advise a fiduciary and there is no need to give advice where question is not one affecting present administration of estate, 128 C 18

§ 2. Miscellaneous Trust Relationships

trust *held* created in vendee so as to permit execution creditor to sue for correction of deed, 21 C 586

executor or administrator during settlement of estate is not trustee within meaning of statute requiring personal property in hands of trustee to be set in list of town in which trustee resides, 38 C 443

in equitable assignments the assignor retaining legal title becomes a trustee for assignee, 50 C 473

property held in fee, subject to payment of income, is not a trust fund, and devisee not a trustee, 51 C 210

—in such a devise equity might interfere under some circumstances to preserve the principal, 51 C 211

—where purchaser intended to defraud legatee of income, 51 C 211

owner of life estate as trustee for others and charged with certain duties may be required to give bond for faithful performance of trust, 55 C 239

a title in trust to an indifferent person to prevent priority among common claimants is a mere naked trust, 56 C 284

—imposed no duties in care of property, 56 C 284

receivers of insolvent life insurance company in what sense are trustees, 61 C 125

husband as statutory trustee of wife, 67 C 443

vested trust estate passes to trustee in bankruptcy; rights of purchaser from him, 76 C 522

funds of fraternal insurance association are trust funds, which equity will control, 81 C 190

prior to 1877 legal title of promissory note in husband as trustee for wife, 81 C 415

adjudication that a corporation has no existence transfers property to directors as trustees, 81 C 467

surplus or reserve funds of a benefit association are trust funds of which the society is trustee for the contributors and all who become certificate holders; not to be diverted, 84 C 96

where a collecting bank is entitled to avails of collection as a trust fund, cannot set off debt due from forwarding bank, 88 C 186

burden of proof is on one claiming a trust relationship, 88 C 187

one who takes money from another to invest is an agent, not a trustee, 89 C 226

directors of a savings bank are in a fiduciary relationship with the bank, 89 C 451

assets of a corporation are a trust for payment of debts; can be followed if turned over to another corporation, 89 C 583

husband married before 1877 is statutory trustee of wife's property, 90 C 677

use and income to wife for life with power to use principal makes her a trustee; ability to expend principal, 91 C 463

the winding-up proceedings of a corporation without capital is committed to board of management as statutory trustees, 91 C 536

wife who is a bare trustee for her husband is subject to the same defenses as he, 91 C 652

title to land under water is in the State for the public in trust, 92 C 349

bailment is the delivery of property in trust, 92 C 702

corporation directors who are trustees to liquidate are not receivers or officers of the court, 96 C 79

where one having life use in fund deposits it to her own and another's joint account, without right thus to provide for that oth-

er, bank is trustee for remaindermen entitled to fund after death of life tenant, 96 C 326

administrator as standing in position of trustee, 104 C 271

town as statutory trustee of its school fund, 105 C 315

joint debtor holding fund from which both are entitled to reimbursement is trustee to other debtor to extent of fund, 110 C 342

the relationship of a corporation to its corporate property is not strictly one of trustee, 113 C 192

where building under construction, whose owner is in financial difficulties, is transferred to attorney as trustee to complete, relationship is one of trust and not attorney and client, 113 C 429

a life tenant is not a trustee though he may be treated as quasi trustee; situation is analogous to that of mortgagee in possession, 113 C 472

mortgagee in possession regarded by equity as quasi trustee as to certain obligations, 113 C 472

private bank made deposit in trust company and received certificate in name of state treasurer which it delivered to him in lieu of bond; *held* could not be set off against deposit by trust company in private bank, 114 C 560

—deposit was trust for all depositors of private bank, 114 C 560

—fact that deposit was not segregated makes no difference, 114 C 560

—but interest on deposit may be set off, 114 C 560

paper sent to bank for collection; relation of principal and agent created; tests of whether trust continues after collection followed by insolvency, 115 C 1

agreement whereby collecting bank substitutes its own obligation for money collected is inconsistent with trust and creates status of debtor and creditor, 115 C 1

—no res to which equitable lien might attach, 115 C 1

bank as trustee of government in receiving pension money, 115 C 326

deposits by State of trust funds not entitled to special privilege or preference in receivership, 115 C 393

tax collected by distributor of gasoline is trust fund held for the State, 115 C 554

doctrine that corporation holds its property in trust for its creditors does not prevail in this State, 116 C 627

where instructions of forwarder to collecting bank are that drafts are cash items, not deposits, and funds collected not to be commingled with other funds of bank, bank (or its receiver) regarded as trustee of funds collected, 117 C 472

§ 2 Trusts

- but it must appear that proceeds, in some form, have gone into assets of bank, 117 C 477
- and where drafts were never collected, there is nothing on which a trust could operate, 117 C 477
- maxim that equity regards as done that which ought to have been done, not applicable, 117 C 472
- in instant case bank properly liable as for conversion, but claim properly classified as general and not entitled to preference, 117 C 472
- relationship between depositors in savings department of commercial bank and assets of that department not within common-law conception of a trust, 119 C 115
- bank has beneficial interest in and legal title to investments, 119 C 115
- contract for sale of land; vendor not trustee of land for vendee, 120 C 393
- equity may for certain purposes treat vendor as quasi trustee, 120 C 393
- pledgee as trustee of surplus of amount realized on property pledged over what is owed him, 121 C 253
- when tenant in common buys in an outstanding adversary claim to the common estate he is regarded as holding it in trust for all cotenants who seasonably contribute their share, 122 C 406 and see TENANTS IN COMMON
- surviving partner holds assets of partnership as quasi trustee for estate of deceased partner, 125 C 663
- executors and administrators as trustees for creditors to extent of debts and for heirs, 127 C 142
- director and officer of corporation occupies fiduciary relationship to corporation and stockholders, but he is not trustee in strict sense of term, 129 C 674

§ 3. Creation and Validity

§ 4. —In General

- express trust in relation to land is not provable by parol, 6 C 285, 37 C 198, 53 C 579, 66 C 499, 75 C 1, 81 C 436, 84 C 560
- aliter, in case of fraud, accident, or mistake, 6 C 285, 16 C 388
- parol *held* admissible to prove express trust in personalty, 37 C 198
- is created by devise to executors with directions to dispose among a class, 8 C 48
- is not created if it does not appear from face of the contract, 8 C 52
- devise of residuum to sons for maintenance of their children, *held* a trust, 8 C 409
- trusts are valid in this State, 8 C 454
- to raise a trust in equity, proportion of each beneficiary to be ascertained, 21 C 257
- trust for support of grandchildren during minority valid and until that trust was dis-

charged no final distribution could be made, 38 C 26

- devise to wife for life for support of herself and children, with power of sale and advancement; trust created in unexpended balance, when, 40 C 438
- real estate converted into personalty; what disposition should be made, 40 C 438
- “all my property to A absolutely and in fee, subject to following trusts”; *held* A took a fee for his own benefit, subject to trusts, 42 C 285
- language of deed *held* to constitute a trust in nature of a mortgage, 49 C 282
- delivery of certificate of shares with remark, “this Aetna stock of yours is good stock, it is all right,” *held* under circumstances a declaration of trust, 50 C 473
- bequest to wife of income for life and so much of principal as necessary for support of herself and children; *held* widow took life estate only in real estate in trust, 50 C 493
- devise in fee, subject to burdens of paying over income; *held* devisee took not strictly as trustee, but individually, 51 C 207
- objection of want of proper description in trust deed, *held* under circumstances not one open to plaintiff, 52 C 330
- by assenting to deed plaintiff and other creditors became parties to the contract therein expressed, 52 C 330
- one cannot ordinarily, impeach or set aside his own title, 52 C 330
- trust deed good in State where made and where the parties reside, *held* good here as to them, 52 C 331
- if executed to gain an extension with eventual payment of all debts, *held* not fraudulent as to creditors, 52 C 331
- trust deed for benefit of assenting creditors cannot be impeached for fraud by an assenting creditor with full knowledge of facts, 52 C 331
- especially where other assenting creditors are concerned, 52 C 331
- such assent *held* not to imply a condition that all should accept, 52 C 331
- trust deed with extension of time; non-payment at expiration does not absolve assent, 52 C 331
- where mortgagors afterwards assigned the equity to same trustee, *held* not to affect trust deed, 52 C 332
- creditors assenting to deed necessarily assent to such later assignment, 52 C 332
- bequest in trust, trustees to pay “income therefrom or such portions thereof” to cestui “at such times as he sees fit,” *held* not an annuity, 53 C 102
- trust for several purposes, some valid and some invalid, will be supported so far as good, if separable, 53 C 257, 76 C 186, 527

—where an annuity charged upon fund was to be apportioned pro rata, *held* executors could retain sufficient of invalid portion to secure share of annuity, 53 C 260

allegation of conveyance of real estate without consideration, upon an understood trust, *held* not demurrable, as a parol agreement to vary writing, 53 C 579

—grantee receiving benefit could be compelled to perform trust, 53 C 579

a receipt for an instalment on stock stating that stock was owned by payee though standing in name of receptor, *held* to create an implied and not an express trust, 59 C 146

—and Statute of Limitations ran against it, where receptor paid remaining instalments, 59 C 146

if trust is properly created it is not defeated by disability, death or nonappointment of trustee, 60 C 314

five different legacies to wife to be used in caring for certain beneficiaries; *held* widow took all as trustee, each upon a separate trust, 63 C 58

—before entering on either of the trusts widow should give a probate bond, 63 C 58

provision in trust that unexpended balance should go to A, in trust after death of widow unless she should “see fit to make a will and dispose of it differently,” *held* not to defeat trust, 63 C 58

where life tenant given power to prescribe mode of applying money for help of beneficiaries, if she failed to exercise it remainderman would take it in trust for same purposes, 63 C 58

bequest of income for life, subject to certain condition, *held* to constitute a trust; if life tenant fails to perform, trustee may be appointed, 65 C 227

where one of weak mind conveys land upon oral promise of grantee to pay him so much a month, 66 C 444

trust to hold for certain time, then turn over estate is a valid, active trust, surviving death of beneficiary, 70 C 219

covenant to stand seised or declaration in trust meant to serve illegal purpose is invalid, 70 C 637

“to A in trust,” *held* to mean, in trust for A, 72 C 502

trust for keeping grave in repair, valid, 73 C 56

trusts void for uncertainty, 73 C 56, 77 C 604

gift to corporation to carry out certain purposes not a trust, 74 C 587, 75 C 83

“implied trust,” as one strictly express but not being clearly expressed, is inferred by construction of language of instrument, 75 C 5

trust gift in will, for purposes contained in certain letter, *held* invalid, 77 C 604

there is no trust if no property is transferred for the benefit of another, 82 C 504

note given to one with instructions to invest proceeds for benefit of a society, *held* that his failure to do so left matter incomplete and did not constitute a gift or trust, as the subject matter of the trust never came into existence, 82 C 504

—that payee was also a director in the charity is of no significance, 82 C 504

how trusts in a personal estate are created, 82 C 509

invalidity of a gift in remainder after a trust does not affect legality of trust, 83 C 654

if will, looked at as a whole, creates a trust, a trust will be presumed; if no trustee is named, executor should administer trust, but should not hold estate open to do so, 85 C 245

a trust under a will cannot be created or added to by oral declaration, 86 C 516

a letter cannot be a declaration of trust under a will; it may help to interpret the will, 86 C 517

promise to pay debt of another in consideration of property received does not create a trust; it is a personal obligation and assignable, 87 C 49

widow given use of property with right to use principal; the widow and her successors were trustees possessed of all powers in the will, 91 C 463

gift in fee with later provision for disposition of “unused” estate, does not make donee trustee of estate, 91 C 663

nature of a trust, 92 C 10, 113 C 471

trust, with a clause making it void if contested, is good, 92 C 168

deed *held* to be a mortgage, not an express trust, 93 C 61

a gift in trust construed to be an absolute gift, as legal and equitable estates were not separated, 93 C 69

trust drawn in inartificial terms *held* not indefinite as to its object or the means of carrying it out, 93 C 344

—trust for support of student at college, 93 C 344

court need not consider motive for creating trust if it is not inherently unreasonable, 93 C 402

enjoyment of property may be postponed by a trust; legatee of principal and income may be same person; not a “dry” trust, 93 C 402

—ten years for continuance of trust not unreasonable, 93 C 403

a testamentary trust that imposes conditions on the enjoyment of testator’s bounty is

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what evidence sufficient to establish a trust, 94 C 350

alleged gift in trust by aged woman in her last illness *held* not to be a trust, 97 C 372

distinction between uncertainty in terms which makes trust void and uncertainty as to intent to create trust which leaves an absolute gift, 98 C 102

arrangement *held* not to constitute a well-defined unequivocal trust, 99 C 179

gift to executors to be distributed at their discretion vests absolute title in them, 99 C 598

—does not create trust too vague to enforce, 99 C 598

no cardinal rule that a gift to executors *eo nomine* is presumably one in trust, 99 C 598

—such gift, like any other, to be decided by the ordinary rule of interpretation, 99 C 598

—does not import a trust if there be no purpose disclosed or persons to be benefited, 99 C 598

—and especially if it is apparent that the testator knew how to create a trust if he desired to, 99 C 598

whether trust is created is determined from the general purpose and scope of the instrument, 99 C 612

inequitable and unconscionable trust agreement between parent and child set aside, 102 C 96

trusts of personal property may be created *inter vivos*, by express statements or implication from acts, 104 C 171

husband given wife's funds for investment; express trust by implication or agency of fiduciary nature, 104 C 171

trust may be created so as to give beneficiary income only, even though no one else is interested, 105 C 262

trust agreement, reserving to donor life use of income and such portion of principal as trustee deems necessary, with power of revocation, and then making gift of principal at her death *held* to be valid trust, not testamentary provision, 110 C 22

—distinction between such a provision and an immediate gift in trust, 110 C 28

—but if there is actual intent that gift was to take effect at death, trust would be invalid, 110 C 32

whether trust is created depends on intent of parties, 110 C 516

where mother bought land on which her daughter and husband of latter could build and they signed agreement to secure property to certain persons by will, including

the mother, this gave rise to a trust, 110 C 516

—informal agreement referring to unsigned but existing trust deed *held* to be presently effective, and to establish valid trust, 110 C 516

—that consent of grantee in trust deed to accept had not been secured *nil sig.*, as equity would not let trust fail for want of trustee, 110 C 524

where A conveyed property to B on his oral agreement to build house and that property should revert on his death, no trust relation established, 113 C 467

a trust requires a definite subject matter, 115 C 1, 117 C 475

certificates filed by insured while divorce proceedings by wife were pending provided "net sum" of policies be retained by insurer at his death and interest paid daughter for life, and directed payments to daughter be made to plaintiff as trustee instead of directly to her; *held*

—attempt to create trust void for uncertainty as to nature and rights and duties of plaintiff as trustee, 117 C 334

—not possible to read into certificates intent to have proceeds of policies form part of trust fund created by will where provisions of latter different, 117 C 334

—in absence of finding or stipulation that intent was for trustee to withhold all interest not needed by daughter (as provided in will), this court cannot so define trustee's duties, 117 C 334

—provisions of certificate clearly indicate intent that entire interest be paid daughter with trustee merely interposed to receive and pay over, 117 C 334

—no effective trust having been created, insurer should pay interest directly to daughter's guardian, 117 C 334

where testatrix sufficiently expresses her intent to create a trust and no rule of law is contravened, the trust is enforceable, 118 C 608

trust agreement providing trustee should collect proceeds of life insurance policies, disburse income and eventually principal, with power reserved to revoke agreement or change beneficiary of policies, *held* not testamentary, 119 C 570

Statute of Frauds contains no express provision that declarations and creations of trust in land should be proved by some writing, 124 C 140

—but it is part of common law that such trusts may not be proved by parol, 124 C 140

conveyance of farm by plaintiff's mother to X without consideration, reserving life use; plaintiff claimed oral trust for her benefit

after mother's death and part performance, 124 C 140

far stronger support for enforcing parol trust of land under devise upon oral promise by devisee than where land is conveyed inter vivos, 124 C 145

valid trust will be upheld even though it be followed by an invalid gift over, 127 C 11

where trust is invalid, and would fall into residue, which is also invalid, property is intestate, 128 C 16

that income of trust is subject to claims of creditors contrary to its purpose does not invalidate trust or affect remainder interests, 129 C 224

§ 5. —Expressions of Intention; Precatory Words

no particular form of words is required to create a trust, 8 C 413, 452, 10 C 243, 85 C 245, 106 C 627

precatory language creates a trust when, 19 C 348, 21 C 257

—not if there be uncertainty in who is to take, 19 C 348

—nor if there be uncertainty as to what is to be taken, 19 C 348.

—nor if discretion whether to act or not be left with trustee, 19 C 348

equity will not raise trust from expressions of hope, confidence, desire, etc., 21 C 257

to constitute a trust from expressions of hope, confidence, request, desire, recommendation, etc., language must clearly import such an intention, and both estate and persons must be designated with certainty, 40 C 447, 86 C 517

"will do by his mother and uncle as he may see fit," *held* precatory in form, mandatory in effect, 63 C 58

what precatory expressions will create a trust; whole will considered, 78 C 4

"direct" as word of command; technical words not necessary; gift to one for benefit of another enough, 80 C 674

a will expressing hope and expectancy that one would carry out a charity in which testator is interested does not create a precatory trust; no subject matter or beneficiary named, 86 C 516

use of words "in trust" not necessary to create trust, nor conclusive of testator's intent, 93 C 69

expressions of recommendation, confidence or desire will not raise trust unless it clearly appears that they were tended to be imperative, 98 C 102

—use of phrase "my will is," 98 C 102

—precatory words cannot cut down an absolute estate given in earlier part of will in clear terms, 98 C 102

—nor create trust if they also apply to other property than that given in will, 98 C 102

—difficulties and embarrassments in administering gift as a trust to be considered, 98 C 102

—gift to educational institution providing "my will is" that buildings be erected only when amount on hand is certain sum, that only portion of entire funds of institution be so used and that it never mortgage its property nor incur debts, 98 C 102

care should be taken not to confuse testator's hopes and desires with expression of formal and legal intent, 99 C 598

test as to creation of precatory trust, 99 C 627

"wish" or "request" that particular person be retained in employment is merely precatory, 105 C 263

provision that homestead be retained by trustees as home for husband and son with "wish" that sister-in-law be permitted also to make home there as conferring mere privilege on latter subject to occupation of premises by others, 108 C 269

words of recommendation, request, desire and the like used in direct reference to disposition of testator's own property, without intervention of act of another, are ordinarily imperative, 112 C 569

—ultimate question is real intent of testator, 112 C 576

gift of residue to wife and if she remarry "it is my desire" that estate be divided with children, creates trust as though language were dispositive, 112 C 570

use of words "in trust" is not conclusive of intention to create a trust, 119 C 114

—where property was transferred to corporation "in trust" for certain purposes within its own objects, *held* that the conveyance did not create trust, 119 C 114

—under provision that property should revert if purposes abandoned, corporation had determinable fee, 119 C 114

testator may give complete beneficial interest in property to persons with hope and expectation expressed in will or otherwise as to how they will dispose of it, 125 C 420

intent of testator as it appears from language will determine whether expressions of hope and desire create trust or are merely precatory, 125 C 420

—to create trust words must be intended as imperative, and when property is given absolutely trust is not to be imposed lightly upon mere words of recommendation or confidence, 125 C 420

absolute gift will be cut down by subsequent provisions only when lesser estate is indicated therein in unambiguous language, 125 C 421

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—rule applied where question is whether subsequent provisions are intended to be merely precatory or to create a legal obligation, 125 C 420

—where will gave residue to trustees to pay income to wife for life and the principal to themselves individually, stating that letters would be left advising as to certain dispositions, which was not done, but expressly disavowing intent to limit absolute estate, *held* no trust of remainder, 125 C 421

terms of will were not merely precatory but created a trust, 126 C 286

—that it did not use word “trust” or designate party as “trustee” of no moment where there was clear intent to create trust, 126 C 289

not necessary to creation of trust that any particular language be used if intent of creator is to establish it, 129 C 111

§ 6. Duration; Termination

trust for schooling of poor children is not terminated by act abolishing districts and making schools free, 39 C 63

—how it properly may be carried into effect, 39 C 63

deposit for education of minor in name of donor as trustee; limit of trusteeship to minority of infant is implied, 40 C 513

under statute state treasurer, as trustee for policyholders, is subject to the law of trusts, 56 C 235

—receivers of insurance company cannot compel him to surrender the trust funds in his hands, 56 C 235

—but they are entitled to the interest and dividends of such trust funds, 56 C 235

trust fund cannot be taken from trustee without allegation of his wrongful possession or administration, 56 C 239

when income divided among several and remainder over void, upon death of one a proportionate part of funds became divested of trust, 61 C 14

trust period, as to grandchild's share, *held* terminated by his death, and that his share vested in his issue free from the trust, 61 C 66

trustee with power to terminate trust at his discretion did so by will; *held* power to terminate came wholly from first will, 61 C 66

—trustee having exercised this power could leave no discretion to the trustee under his will, 61 C 66

Statute of Limitations runs against resulting trust on ground that tenure of trustee is adverse to cestui que trust, 62 C 403

trust to wife to pay over income to daughter as wife deems best does not survive wife's death, 70 C 288

where will gives income to A for certain number of years, then principal, and A dies during period, trust terminates, 72 C 502

trust until child is twenty-five, and longer, if deemed best, requires affirmative judgment for continuance, 73 C 89

purchase of cestui's interest by trustee as terminating trust, 77 C 214

court cannot terminate an active trust, 78 C 81

trust for life, inalienable and beyond reach of creditors is active; such trust is valid; that beneficiary can dispose of principal by will of no consequence, 78 C 81

death of donor revokes a naked power to create trust inter vivos, 82 C 504

signing certificate terminating a trust with knowledge that it is not correct, *held* not to make termination void, 82 C 552

where trust was to terminate on trustees' filing certificate that cestui's habits for three years had been such as to safely intrust him with property, a court certificate could be issued that would protect trustees even when one of them knew cestui used liquor to excess, 82 C 552

trust for education of brother's children, then over, *held* not to accumulate until all possibility of children being born had passed; should be distributed on death of only one alive at testator's death, 86 C 90

interest of nephews and nieces *held* to cease after trust period of twenty-five years when ultimate owners took corpus of fund, 89 C 271

appointment of receiver of trustee does not terminate trust unless it is so provided; where collateral is involved, 89 C 645

to terminate a testamentary trust all parties must ask it; every purpose of the trust must have been accomplished; its termination must not disturb restrictions put on by testator, 90 C 63

if a trust depends on trustee's discretion and will, it terminates at his death, 90 C 461

court cannot determine trust that would affect rights of unrepresented parties, 91 C 500

present legal remedies will not be extended to cover termination of a trust, 91 C 500

testamentary trust not terminated by judicial decree on ground that beneficiary is alone interested in remainder, 91 C 500

equity will not permit valid trust to be destroyed or force merger against intent and interest of creator, 98 C 677

will established trust, income to go to certain persons, upon death of any one “the trust created for the benefit of such deceased” to terminate, “said trust estate upon such termination freed from such trust” to be paid in a certain proportion to the children of the deceased; *held* termination referred

to was merely as regards interest of person dying, not of whole trust, 99 C 187
 if valid, duration is limited only by accomplishment of its purposes, 105 C 261
 if dominant intent is payment of annuities, illegality of restriction on sale of real estate does not terminate trust, 105 C 261
 where restraint on sale of trust real estate void, trust does not necessarily fail, and property may be sold, sum set aside for purposes of trust, and balance paid over to residuary devisees, 105 C 284
 trustees directed to carry on business for benefit of annuitants; upon failure of business, trust should continue with proceeds of sale of property, 106 C 602
 no rule limits duration of trust if beneficial rights are vested, 112 C 216
 conditions precedent which should concur to warrant termination of trust by judicial decree, 125 C 641
 —is to be limited to cases where all interests created have vested and parties are sui juris and represented and design and object of trust at least practically accomplished, 125 C 641
 —so termination decree denied while wife alive where trustee directed to pay income in thirds to wife and two sons and at her death to hold for them until age of thirty and then pay them principal, share of any then deceased to go to heirs, 125 C 640
 —until death of wife unborn issue of sons have potential interest, and until then purpose of trust not accomplished, 125 C 641
 where trust not of public or charitable nature, no purpose of making attorney general party defendant in suit to terminate it, 125 C 649
 —his presence of party does not afford adequate representation for unborn issue of plaintiff, 125 C 649
 —nor can parents represent the interest of unborn issue where their interests are not identical, 125 C 649
 vote of cemetery corporation that the legacy be “declined” did not terminate trust, where five years later it rescinded this vote and voted “to accept the legacy,” 126 C 286

§ 7. Resulting Trusts

resulting trust defined, 6 C 285
 parol admissible to show resulting trust if agent takes deed in his own name, 16 C 388
 to raise trust, in equity, proportion of each beneficiary to be ascertained, 21 C 257
 family arrangement; title by deed and possession; *held* equity would not interfere, 32 C 112
 land purchased by several, in name of one, for use of mother, on death of mother becomes a resulting trust, 35 C 166

—parol *held* admissible to prove the trust, 35 C 166
 resulting trust is not purged by property passing through one without notice, 35 C 166
 resulting trust is founded upon presumed intent of parties; parol agreement effecting same end as resulting trust, does not defeat it, 41 C 278
 where brother and sister purchased building lot upon oral agreement that they should pay for and own it together, but deed was taken in name of brother only, his title was subject to resulting trust to sister for one half interest, 41 C 279
 A buys land and has title conveyed to B; law raises a trust in favor of A, 49 C 93
 in equitable assignments, assignor retaining legal title becomes trustee for assignee, 50 C 473
 purchase money paid by one, legal title taken in another; the law raises a trust in favor of the former, 59 C 188
 —same rule applies where purchase money is paid by one and title taken by him and another jointly, 59 C 188
 —exception where grantee is the wife, child, or other person for whom the purchaser is bound to provide; it is then *prima facie* a settlement, 59 C 188
 presumption of a resulting trust may be rebutted how; may be supported by parol proof, 59 C 188
 Statute of Frauds will not extend to trusts arising by operation of law, 59 C 188
 where a husband bought land with his own money and had it conveyed to wife *held* transaction was a resulting trust in absence of evidence of a gift, 62 C 403
 —such a trust may be proved by parol, and is not within Statute of Frauds, 62 C 403
 nature of trust is not affected where parties have made an agreement identical with that imputed by law, 62 C 403
 —statute does not cancel duty of trustee but merely suspends the remedy, 62 C 408
 —but where trust is at all times acknowledged there is no adverse holding, 62 C 403
 resulting trusts which can be rebutted are those which rest on a mere implication of law, 63 C 126
 —not those arising on failure of an express trust for imperfection or illegality, 63 C 126
 trust results where deed is made without consideration; statement of consideration of “— dollars” enough to rebut it, 64 C 78
 —statement of consideration and habendum clause rebut it, 65 C 477
 consideration necessary for implied trust; such trust did not arise from payment of assessments on insurance policy for a few years and then stopping, 70 C 537

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evidence of impossibility of performing testamentary provision as establishing resulting trust, 74 C 588

—such trust not rebuttable by extrinsic evidence, 77 C 605

no resulting trust where there is valuable consideration, 75 C 4

trust arising from contract of sale pending payment and delivery, 76 C 642

—this relation does not result from option contract, 76 C 642

resulting trust from advance of part of purchase price; effect of recording law, 79 C 286

where A was under obligation to provide for B and her son and gave a note payable to her, and B gave it back on A's promise to provide for her by will which he failed to do, she can claim the whole, 82 C 600

—it is impressed, however, with a trust in favor of her son to the extent of his interest, 82 C 601

a trust is imposed by equity in property held by one if it appears that another has an interest therein, 82 C 601

implied trust or resulting trust rests on presumed intent, 84 C 560

—facts on which a trust may be implied must clearly appear, 84 C 560

—especially true when an apparent absolute title is in reality a trust, 84 C 560

a tenant in common who buys in an incumbrance holds it in trust for his cotenants, 85 C 379

no resulting trust arises in favor of one giving no consideration, 85 C 430

—assignee of unpaid portion of future payment mortgage cannot claim trust against mortgagee who foreclosed, 85 C 429

where a conveyance is voluntary, and trust fails or is performed, donee will take the estate free from burdens if such appears to be the intention, 85 C 685

—otherwise a trust will result for donor or his heirs, 85 C 685

where A and B agree that B buy land, to be rented or sold, each to pay one half, a trust results for A, 86 C 481

a bank that receives notes for collection after it has ceased to do business holds them in trust for owner, 88 C 187

contract to lease farm as security for pay for fertilizers raises no resulting or constructive trust, 88 C 634

if presumption of gift to wife of land purchased by husband is rebutted, an implied or resulting trust arises for husband; parol evidence admitted, 89 C 243

where oral agreement is identical with presumption of law from the purchase and disposition of land, resulting trust arises in favor of purchaser; otherwise not, 89 C 243

moneys withheld by State and town on building are not impressed with a trust for subcontractors and materialmen, 90 C 7

a wife who is grantee, without her knowledge and without consideration, of land exchanged for that of her husband, is trustee for him, 91 C 651

one who receives insurance money by mistake of insurance company holds as trustee for the party rightly entitled to it, 92 C 1

trust is implied when it is deducible from the transaction as matter of intent, 92 C 2

resulting and presumptive trusts are created by operation of law, 94 C 350

where purchase price is paid by one and legal title taken in name of another, there is a resulting trust, 94 C 350

—is not dependent on a definite understanding, 94 C 350

resulting trust is based on intention presumed or implied, 94 C 597

payment to mother of minor who holds money because of fear of litigation and not solely for his benefit does not establish trust as to it, 99 C 174

—intent of person receiving money is quite as important in determining whether it is held in trust as is intent of person paying it, 99 C 180

nature of rights in and action to recover property delivered to one who undertakes to deliver it to or use it for another, 99 C 209

parol assignment of life insurance, with delivery of policy, vests in assignee an equitable interest; and where assignee also pays premium, trust relation arises, 103 C 341

where one supposing herself to be wife of insurer pays premium on policy on agreement that she is to have benefit of it, 103 C 342

where it was agreed that contract by A to purchase real estate should be taken in B's name and B thereafter himself paid balance due and took deed, A can demand conveyance or assert claim for damages, 106 C 288

—if A took former course he must do equity, 106 C 290

—proper allegations in latter case, 106 C 290

resulting trust where husband gives earnings to wife to deposit in her name and no intention to create interest for specific portion appears, 107 C 348

—resulting trusts rest on presumed agreement, 107 C 348

—none where no definite interest in fund was intended to remain in him, 107 C 348

where wife pays for property which husband takes in own name, claim of resulting trust is rebutted by relationship, 110 C 314

resulting trust from payment of purchase price of property, title to which is vested in an-

other, rests on presumed intent of parties, 112 C 455

—cannot be based on gift of money, though made with intent to enable another to purchase property, 112 C 455

intention or attempt to vest beneficial interest in wife, unaccompanied by an effective act, could not give rise to trust, 112 C 457

K agreed with partner T to share all profits from outside transactions and then incorporated; *held* that shares received by K represented corpus and not ascertained profits, 113 C 449

—and T's assignee had no claim upon shares by way of trust or lien, 113 C 449

no trust or lien attaches to money received as the purchase price of a valuable right, 113 C 449

where quitclaim deed states a valuable consideration, this is sufficient to rebut any claim of resulting trust, 113 C 467

articles delivered to vendee, where no conditional sales contract executed or recorded, not held by vendee in trust capacity for vendor, 114 C 69

real estate is impressed with a trust for the benefit of joint adventurers whether title is in one or all, 115 C 418

—this trust follows it until it falls into hands of bona fide purchaser, 115 C 418

where husband purchased farm with joint funds of himself and wife, he holds one-half interest in trust for her, 115 C 418

• resulting trust not created where trustee under mortgage securing many small note-holders bid in property, under court authorization, at foreclosure sale, 116 C 320

when there is conveyance of real property for particular purpose, when purpose has been fulfilled or frustrated, law presumes an agreement on part of grantee to reconvey to grantor, 117 C 58

—such presumed agreement gives rise to resulting trust, 117 C 58

—quitclaim deed stating valuable consideration, is sufficient to rebut presumption of such a trust resulting at time deed was made, 117 C 62

—nature of trust not changed because parties have actually made agreement identical with the one which law imputes to them, 117 C 58

—that such an agreement is not in writing does not prevent trust arising, 117 C 58

P made deed of land to bank in difficulties to enable it to make loan; deed held by bank commissioner pending investigation but never recorded until after bank went into receivership and loan never consummated; P *held* entitled to reconveyance, 117 C 58

if title is taken in name of (or transferred to) third party for purpose of defrauding cred-

itor of party who pays purchase-money, equity will not assist him in enforcing the resulting trust, 117 C 289

defendant conveyed home to plaintiff wife with purpose (as he testified) of creating estate beyond reach of creditors; *held*

—question of presence of fraud was open one for jury under proper instructions and should have been submitted to them, 117 C 289

—and charge stressing element of resulting trust only was error, 117 C 289

plaintiff took assignment of long term lease to part of large tract, subdivided it and leased to various persons; main lease terminated by summary process and new company formed by sublessees of this tract and others which obtained new lease and then sublet to sublessees who subscribed to stock; *held* only purpose of company was to secure new leases for sublessees, and no trust obligation to protect reversionary interest of plaintiff in his subleases, 120 C 129

assignor of debt holds bare legal title in nature of trust for assignee, where notice of assignment not given debtor, 121 C 36

where purchase money for property is paid by one and title is taken in name of another, resulting trust arises in favor of former, 121 C 153

—exception when purchaser takes conveyance in name of wife, where transaction is regarded prima facie as settlement, 121 C 153

—but question of intent one of fact and court's failure to find transaction was gift conclusively determines matter, 121 C 153

—and by conduct *held* husband waived rights to any resulting trust, and indicated intention that his interest be limited to that of surviving husband, 121 C 153

conveyance of land by husband to wife in consideration of love and affection gives rise to no equitable interest on his part, 121 C 663

if tenant in common buys in outstanding adversary claim to common estate he holds it in trust for cotenants who contribute, 122 C 409

where insurance was taken out in name of nominal owner of property, he was trustee of resulting trust for real owner, who was suing as beneficiary of written contract, 123 C 414

where one takes title to property acting in behalf and for benefit of himself and another, constructive (resulting) trust raised in favor of that other, 125 C 234

company which issued participating certificates on mortgage and came into possession of property by foreclosure held it charged with trust for certificate holders, 128 C 361

§ 8 Trusts

§ 8. Constructive Trusts

promise to testator to convey the property if his will be not altered, *held* to create a trust, 41 C 197

no constructive trust where no fraud, misrepresentation, confidential relations, etc., 75 C 4, 88 C 634

trust from acceptance of money under unfulfilled promise to apply it, 77 C 616

trust imposed on goods converted, in hands of administrator of person converting them, 78 C 600

trust arising from unjust advantage taken in family settlement, 79 C 644

trust *ex maleficio* where grantee takes deed under oral promise to hold it in trust, and sells land for his own use, 81 C 433, 86 C 258

presumptive trust arises when one is by fraud induced to pay more than his share, 86 C 481

constructive trusts or trusts *ex maleficio* are based upon fraud and deceit, 88 C 633

contract to lease farm as security for pay for fertilizers raises no resulting or constructive trust, 88 C 634

constructive trust arises in invitum to do justice, 94 C 597

—as where corporation officer buys stock in his own name with its funds, 94 C 597

continued existence of constructive trust and the equitable property rights of the real owner is not affected by his solvency or insolvency, 94 C 597

subrogation is a relation analogous to a constructive trust, 97 C 639, 649

profits made by president from secret competition with his corporation, 102 C 169

trust *ex maleficio* will be impressed upon property in preference to rights of creditors who have not given credit upon strength of it, 104 C 666

fraud, actual or constructive, is foundation on which law raises constructive trust, 118 C 640

—and fact that quitclaim deed stated valuable consideration rebuts any claim of trust arising when it was made, 118 C 640

recipient of proceeds of life insurance policy under facility-of-payment clause is constructive trustee for legal beneficiaries, 120 C 471

to raise a constructive trust by reason of fraudulent acts and purposes in procuring title to land, an intentionally false verbal promise to begin with, obtaining the conveyance, is necessary, 121 C 153

—mere subsequent repudiation of verbal promise not enough, 121 C 153

—and verbal agreement that grantor should have right to life use, did not raise constructive trust, 121 C 153

—an absolute quitclaim deed expressed to be upon valuable consideration cannot be

converted into a conveyance in trust for grantor, by proof of oral agreement to that effect, 121 C 160

elements that may, under proper circumstances, make for constructive trust: fraud, misrepresentation, imposition, etc., 121 C 159

where transfer of property was void, not being of a present interest or in compliance with Statute of Wills, action by administrator not based on constructive trust, 127 C 166

§ 9. Construction, Operation and Execution

§ 10. —In General; Powers and Duties of Trustee

the intent, as expressed, will govern, 10 C 244

where an estate in fee only will satisfy the trust, a fee passes without the word “heirs,” 10 C 244

technical and harsh interpretation of restrictions on trustee’s power to sell real property, where he cared for testator’s imbecile son, rejected, 32 C 346

life estate with remainder over; trustee chargeable with safe-keeping until delivered to remaindermen, 58 C 332

—but remaindermen *held* not strictly beneficiaries, 58 C 332

trustees of remainder are entitled to possession on death of life tenant, 76 C 560

where income of fund is given for life or years, by will, on settlement of estate; trustee is entitled to income from testator’s death; how determined where fund not separated, 77 C 51

where will provides that property shall go in remainder to certain persons, excepting that certain income shall go to another, trustee should set aside sufficient fund to produce income, 78 C 512

trustee receiving stock dividend to distribute may convert it into cash, if necessary for fair division, 79 C 547

trustee cannot contract to give or guarantee fixed sum to each of several life tenants, 80 C 460

trustee paying fund under order of court protected, 82 C 552

gift to A to be paid when he reached twenty-one; proper course is to put sum into a trust to accumulate, 87 C 175

trust must be used for purpose clearly expressed, not expanded by construction, 93 C 69

court will authorize departure from exact adherence to provisions where necessary to carry out intent, 109 C 187

—but only when necessity or preservation of estate requires, 109 C 187

functions of trustee under will ended with acceptance of final account; distribution of

remainder reverted to Probate Court, 121 C 106

where trustee is given discretionary power, courts will not interfere in absence of fraud, bad faith or abuse of discretion, 122 C 333

§ 11. —Rights and Interests of Beneficiaries Generally

testamentary trust fund *held* distributable after payment of debts and legacies, 3 C 166

terms of trust govern the rights of parties seeking benefit of trust, 7 C 485

beneficiary has devisable interest, where he is given whole beneficial interest, 72 C 322, 80 C 11

gift to donees "in trust," where provisions amount simply to gifts over on death of donees *held* to give them beneficial interest, 72 C 494

where income was included in fund transferred to trustee under order of court, this does not amount to adjudication that income was principal as against cestui, 74 C 218

where a note is secured by a trust deed to third party, cestui may lawfully buy premises at foreclosure sale, 74 C 248

where fund is given in trust to pay over income, how income is determined before fund is set apart; cestui entitled to whole income after it is set apart; excess payments, 77 C 94

interest of cestui under trust to invest and pay over income of fund is assignable, 77 C 214

power to dispose of principal does not enlarge cestui's estate, 78 C 81

life tenant's interest in testamentary trust runs from death of testator, 81 C 510

increase in value of trust fund by sale of subscription rights and rise in market quotation goes to benefit remainderman, 83 C 12

in a voluntary trust conveyance where the trust fails or has been fully performed, the donee takes free from all burden if it appears he was intended to take beneficial interest; otherwise a trust results to donor or his heirs, 85 C 685

during continuance of life estate, beneficiary has no right to possession on theory that she is the sole legatee, 90 C 64

—cannot ask for construction of residuary clause to give her absolute ownership, 90 C 64

right in and to alienate an unrestricted life use of income, 90 C 293

testator can postpone legatee's enjoyment of the principal of a trust for several years by giving him only the income; must be reasonable; ten years not unreasonable, 93 C 402

trust of residue for life tenant; he becomes entitled to income from death of testator, 96 C 176

where trust fund consists of bonds chosen by trustee, beneficiary entitled to income earned by the bonds selected since testator's death, 102 C 318

legatee of certain sum bequeathed in trust entitled to income from testator's death, 102 C 318

—and if no sum set aside, average rate earned by estate applies, 102 C 318

after trustee's death, Superior and Probate Courts have concurrent jurisdiction over beneficiary's equitable claim; action in Superior Court not barred by nonpresentation of claim in Probate Court, 104 C 169

cestuis que trustent under declaration of trust of land become in equity owners of the land, 106 C 683

principal of trust fund represents sole interest of remainderman and fund which results from earning power of principal represents interest of life tenant, 109 C 268

right of cestuis que trustent of dry trust to possession of property and to call on trustee for conveyance of legal estate, 116 C 325

where right of partition exists if court finds that interest of owner will be best served by sale of land and distribution of proceeds, our statutes authorize such sale upon application by proper parties, 123 C 249

—where there were four hundred and fifty notes under mortgage, to holders of which would be distributed undivided interests in apartment, and deed itself provided for sale after foreclosure, *held* sale only proper way to terminate trust, 123 C 249

—but conditions present not such as would warrant sacrifice of value by immediate sale, 123 C 249

beneficiary entitled to income earned by trust fund from testator's death to settlement of estate, 124 C 579

—if fund not separated from corpus of estate, average rate earned by personal estate as whole treated as that earned on trust fund, 124 C 579

—not paid to beneficiaries as it accrues but is turned over to trustee as special fund, 124 C 579

—abatement of this special fund when not sufficient assets to pay legacies and trusts in full, 124 C 580

—adjustments to be made when funds subsequently become available, 124 C 580

function of court not to reduce or increase gifts to beneficiary but to secure to him that interest only which donor intended, 125 C 641

beneficiaries of trust for life with remainder to issue had property interest but it was not personal interest they could assert against estate and was not garnishable, 127 C 113

§ 11 Trusts

statutory provision that stock dividends shall belong to principal of trust except where corporation expressly declares them to be made from earnings since formation of trust, 128 C 426

—statute applies unless express statement is embodied in resolution of directors or is made by some other formal action, 128 C 426

—contention of life tenant that action of directors, in connection with published financial reports, amounted to express declaration, without merit, 128 C 426

right to income of beneficiary who died before termination of trust until trust terminated became part of residue, 128 C 567

§ 12. —Particular Provisions

executors who were brothers of testator and their children *held* excluded from devise to them in trust, “for our brothers and their children,” 8 C 47

trust for benefit of daughter, residuum to grandchild; daughter *held* entitled to whole income where entire management was given to trustees, 21 C 538

trust provisions construed de division of annual income, 22 C 31

trust deed with clause allowing beneficiary to choose grantee, merely authorized change of trustee, 30 C 282

cestui que trust *held* to take an absolute interest, subject to right of trustee to control, 33 C 211

advancement *held* not to be included in division of trust fund, 49 C 48

increase of stock not a “rent, dividend, increase or income” payable to cestui under trust, 50 C 66

annuities during life; after ten years two-thirds of income to go to annuitants; *held* income was in addition to annuities, 53 C 261

estate in trust to hold one-third and all the income therefrom for use of widow, one-third for son, one-third for daughter; on death of wife the son and daughter to share her one-third equally; *held* only one trust was created in one entire fund, 55 C 364

testator by “profit and income” intended income only, 61 C 14

devise to B in trust for B’s children, with power to delegate trust or appoint new trustees by will, or terminate trust at his discretion; B bequeathed to trustees for use of children and their heirs, the legal representatives of any dying to take his or her “share,” 61 C 66

—*held* “share” referred not to income but to corpus of estate, 61 C 66

—and upon death of any of the beneficiaries his or her share vested free from the trust

in the issue of such deceased beneficiary, 61 C 66

bequest to A in trust for B, A to take in case B died; A died; *held* B took the property free from the trust, 63 C 251

devise for homestead to executors in trust for tenant, with directions to pay taxes and assessments, and keep same in repair out of funds of estate, requires them to set aside sufficient fund for this purpose; trust not too uncertain, 64 C 40

gift for home and support of wife, construed, 71 C 220

trust to educate restricted to minority, 75 C 501

bequest in trust, permitting cestui to manage trust, 76 C 212

power in trustee to permit cestui to manage estate; effect of pledge by him, 76 C 212

trust for erection of school building; general intent prevails over special, to remove time limitation, 77 C 705

complicated trust provisions for children during life, then over to their issue, until they are twenty-one, when they are to take absolutely, with further provisions for widows of sons, for “descendants” of sons dying, and for withholding and restoring income at discretion of trustees, construed, 78 C 499

sum to widow every six months or oftener for life “out of net annual income”; possible deficiencies not payable out of after-acquired income, 78 C 606

gift of money in trust, principal to be paid in equal instalments, with interest accrued added to each; interest runs only from one year from testator’s death, 78 C 704

“dividends, rents and profits” *held* to mean net income, 79 C 634

gift to trustees, to pay income to certain of themselves, with ultimate division of it among all; merger of legal and beneficial estates on termination of trust, 80 C 673

trust for sons and daughters, income to be paid to daughters, “excepting those who may be married at and after my death,” until all married or, “in event of the aforesaid daughters not marrying,” until it is found convenient to divide money, etc., construed, 80 C 673

“income,” “net income and profit,” etc., designates income as distinguished from principal, 81 C 509

certain provisions *held* to affect not trust funds, but the bequests in the will, 82 C 533

to be held in trust until trustee convinced one was capable of managing property; trustee’s decision *held* good even though he knew beneficiary drank, 82 C 552

sister to whom drunkard conveyed property under declaration that she was to convey

- it back if he lived soberly for three years; *held*, the condition not having been fulfilled, donee could retain the property after his death, 85 C 685
- donee not estopped from claiming title against third party who knew the circumstances and who was permitted to collect the rent for donor's benefit, 85 C 685
- a direction to trustee to pay to one certain portions of a trust estate imports a gift of principal, 88 C 269
- income of fund to be paid to two sons and two daughters and remainder to issue of each child; a trust was made of the residue to be held in the same way; *held* that this trust as to principal and income must be treated in same way as the fund, 88 C 286
- trust for life of wife and daughter or survivor is an active trust for the daughter after wife's death, 90 C 64, 91 C 500
- trust to pay last illness and funeral expenses not to be used for other purposes, 93 C 69
- trust to pay over money at death of husband does not mean at his divorce, 94 C 426
- where property is settled, income to settlor for life, property then to go to her daughter, or if she predeceased, to daughter's executor, interest would revert to settlor on death of daughter before her, intestate, 97 C 408
- income how apportioned under trust for several with provision that "on death of any with children" such children would take portion absolutely but on death of any without children, share such children would have taken to become a part of and be added to trust, income to be paid to life beneficiaries surviving in same proportion as amount given them in first instance bears to whole estate, 99 C 187
- gift in trust for four children; on death of any with issue they to take share of trust; on death of any without issue share to be held in trust for survivors; if all die without issue then to testator's heirs, with residuary gift to same four children; *held* each did not take base fee determinable upon death with issue, 103 C 310
- direction to maintain office in building forming part of trust estate obligatory so long as trustees own land, 105 C 264
- directions as to use of money remaining in hands of executors or trustees after legacies and expenses of settling estate were paid *held* to apply to funds coming to trustee during trust as well as to executors, 109 C 187
- direction to use it to pay off mortgages on property and to invest balance is a denial of power to make permanent improvements to property, 109 C 187
- transfer of "securities set forth" in certain schedule includes everything listed, as savings bank accounts, 110 C 22
- provisions for payment of income and principal to wife of C were for personal benefit of second wife who took place of divorced wife, 110 C 117
- gift, after life estate of wife in residue, in trust "to assist in education of grandsons"; widow lived to eighty-six when grandsons were twenty-nine and twenty-seven, were married and employed; *held*
- "education" used in popular significance associated with youth and education in schools, and gift could not be used for adult education of grandsons, 120 C 123
- where residue was left in trust, income to be paid children and on their death principal to go to grandchildren, payments provided for upkeep of property left brother should be charged against principal of residue not income, 121 C 682
- where shares in estate were given to son and granddaughters, with cross remainders, real estate to be part of son's share, and he was named trustee of shares of granddaughters, trust *held* to include real estate after son's death, 122 C 172
- where testator authorized trustees to invest and reinvest fund in real estate and mortgage bonds or in such other "securities" besides those recognized by law as they considered safe, *held* securities included bonds, debentures, preferred and common stocks, rather than only those secured by pledge of collateral, 122 C 384
- prevailing conception of term "security"; not limited in its scope to obligations secured by collateral, 122 C 384
- provision in inter vivos trust authorizing trustee to pay all proper charges "arising hereunder including taxes," construed with respect to estate and succession taxes, 124 C 66
- residue left in trust to construct memorial to father, preferably drinking fountain; *held* plan of trustee to contribute fund (now \$300,000) to building fund of Hartford Public Library for new building to cost \$750,000, which should contain suitable memorial, not such as authorized by will, 124 C 490
- for application of doctrine of approximation, see CHARITIES § 5
- where will devised one-half of residue to son and other half to grandchildren with provision that share of grandchildren should be held in trust, with gift over in the event that either of them died leaving no issue, and one grandson died leaving son, he is immediately entitled to one-half of the principal of the fund, 125 C 656

§ 12 Trusts

dominant intent of testator was that residue be held as single trust, rather than that trustees should set up separate funds out of each of which gifts of income should be paid, 127 C 654

where certain income for life payable to beneficiaries, with proportionate reduction if total income of residue falls below \$55,000, trustees may make payments without waiting until end of year, 127 C 654

§ 13. —Disposition of Excess Income; Accumulation

biennial payments of specified amounts; income over *held* to go into accumulating fund, 26 C 493

trustee charged with duty to use fund for personal use of life tenant should allow excess not so needed to accumulate, 58 C 210

—on expiration of trust to distribute fund according to terms of trust, 58 C 210

legacies given in trust; one beneficiary died; *held* amount of that legacy unexpended should be invested and accumulation added to principal during lifetime of trustee, 63 C 58

disposition of excess income where will directs trustee to set aside fund to produce a certain income, 73 C 670

trust for accumulation of interest for twenty years and holding of principal for forty years, 74 C 228

bequest making one-half of income payable to A, and certain sum from income, to B, and at death of A and B, over, one-third to each executor and one-third to another; surplus income accumulates during trust, 77 C 411

under trust for accumulation until beneficiaries severally reached thirty, *held* income was to be added to principal of fund, not to principal of the legatees' respective shares, 82 C 533

—legatees not entitled to accumulation while under thirty years of age, 82 C 533

a provision for education of future born children *held* not to require that estate be held for accumulation, 86 C 90

trust to pay \$500 monthly from income to widow, and to pay certain legacies as soon as practicable, with gift of the residue; legacies are to be paid at once subject to retention of enough for widow; surplus should accumulate as a trust fund, 87 C 384

income accumulated and not disposed of belongs to those who have beneficial interest in the fund; passes to residuary legatee, 89 C 271

testator stated that a careful use of the trust fund would give granddaughter sufficient amount and therefore he did not leave her a specific sum; *held* trust fund was for ac-

cumulation during infancy and only so much should be used as necessary for support and education, 90 C 517

disposition of income accumulated after testatrix' death before trustees took over residue under provision that any "unused" income should be added to principal of trust, 96 C 176

disposition of income at death of J where gift of life use was made to him with right of trustee to withhold payment if he claims him incapable, 98 C 263

if fund set aside, balance at death of annuitant reverts to residuary estate, 102 C 319

where trust was created to pay annuities and came to produce income largely in excess of that needed for them, *held* no intent could be found to have excess distributed to remaindermen, 105 C 261

—but excess might be distributed as undisposed of by specific gift and thus a part of residue, 105 C 261

—so if, by sale of land forming part of trust, fund became excessive for payment of annuities, excess might be likewise distributed, 105 C 284

—how amount to be retained is determined, 105 C 284

—invalidity of such a provision *held* not to invalidate testator's dominant intent in creation of fund for annuity, 105 C 261

where fund greater than needs of trust, remaindermen entitled to excess of principal or accumulated income, 106 C 140

excess income from trust *held* intestate estate, 106 C 627

in view of other provisions for son in will, *held* that income from proceeds of sale be accumulated until he was twenty-six, then paid to him, that thereafter income be paid to him until he was thirty, when he would receive the principal in lieu of the homestead, 108 C 259

remainderman entitled to excess income from annuity fund, 109 C 7

trust for support of son and family; at son's death accrued income to be distributed to pay debts incurred by him for support, 110 C 117

where property put in trust to pay large annuities produces large excess income, intent as to disposition must first be sought in will, 112 C 481

—where will directed investment of all surplus income, with avails of property sold, this showed intent to accumulate excess, 112 C 481

where testator establishes trust fund, income from which is to be used for certain purposes, question whether excess shall accumulate and be added to principal or be otherwise disposed of depends on intent of testator; cases reviewed, 117 C 417

—when will discloses intent that it should accumulate, or its distribution will be contrary to scheme of will, it should be permitted to accumulate unless this would be invalid, 117 C 417

—where will discloses intent that there should be no accumulation or such accumulation would be contrary to scheme of testator, or where will discloses no intent either way, it should be distributed to those entitled to it, 117 C 423

—while excess will accrue for distribution at periodical intervals, right to receive it is interest capable of becoming vested under terms of will or may be intestate estate, 117 C 417

trust fund to provide annuities for children and brother and sisters; *held* no indication of intent that excess income should accumulate but terms showed possibility of excess overlooked; excess should be distributed, 117 C 417

where there is excess income above that required for specified uses, right to receive it will pass under residuary clause, if adequate, and not contrary to intent as expressed in will, 117 C 417

—fact that excess will vest in same persons to whom definite portions of income are given will not prevent application of principle, 117 C 417

—but if gift of residue is contingent, so that there is no one with definite right under will, right to excess income will be intestate estate, 117 C 417

gift of “principal and capital” of trust after its termination; evident fact that testator overlooked possibility of excess income; *held* right to that excess became intestate property, 117 C 417

—and unnecessary to determine whether disposition of trust fund at its termination was contingent or vested, 117 C 417

income withheld as not necessary for support of beneficiary should be accumulated with principal fund, not in separate fund, to become part of beneficiary’s estate (but see *dis.*), 119 C 131

whether income from fund not needed for payments provided for is to accumulate or be distributed depends on intent, 121 C 13

—in instant case such income added to principal as general fund to be administered for benefit of all, 121 C 15

whether surplus income from trust constitutes intestate estate currently distributable to heirs or whether it should be accumulated and added to principal, depends on intent of testator as evidenced by will, 127 C 206

—so where testator provided that so much of income and principal of trust be used for support of daughters in discretion of

trustee and it was apparent he never conceived of possibility of accumulated surplus income, such income was intestate, 127 C 206

surplus income to be determined and distributed on basis of calendar year, 127 C 219

trustees who acted in good faith in withholding payment of excess income and who made no individual profit in so doing, should not be penalized, 127 C 224

method of paying out accumulations, 127 C 655

duty of trustees as to payments of income, collected and accrued, to estate of daughter after her death, under provision for payment to her of such part of income as they deemed necessary for her support, 127 C 655

—question with respect to dividends declared before but paid after her death not answered where court not informed of State where corporation domiciled, whose law would control, 127 C 655

§ 14. —Discretionary Use of Principal and Income by Trustee

See also § 29, *infra*

discretionary disposal of estate for support; equity interferes only on abuse of trust, 37 C 384

right to support includes support for wife beneficiary afterwards marries, 53 C 216

gift of income to wife for life with power to sell if for her convenience or comfort; property to be in her possession for the family, for the education and support of daughter, and in trust for son; *held* widow took life estate with limited power to dispose of principal, 55 C 239

—son took no benefit of the property during the life or widowhood of mother, 55 C 239

provision for education and support entitles beneficiary to such education and support as her circumstances and condition in life would reasonably afford, 55 C 241

bequest of certain sum in trust to be applied, principal and income, as beneficiaries needed assistance, sufficiently certain, 57 C 147

—beneficiaries *held* to be those who would take under Statute of Distributions, 57 C 147

—class *held* to consist of persons living at death of testator, 57 C 147

—trustees *held* to have discretion as to beneficiaries and amount to be applied, 57 C 147

—if none were in need, trustees’ duty is to hold fund for any future demand, until fund is exhausted or the class ceases to exist, 57 C 147

§ 14 Trusts

- what degree of discretion to be used by trustees, 57 C 147
- “necessary for support” to be construed with reference to situation and condition in life, 57 C 553
- “necessary for personal comfort” *held* to mean necessary for support, 57 C 553
- gift of life estate in trust for husband; provision for payment of income and principal, “as he might require for his personal use,” *held* not to enlarge to fee, 58 C 210
- “require” means what, 58 C 210
- trustee should use his judgment as to payment, 58 C 210
- if trustee differs with beneficiary, court will protect rights of all parties, 58 C 210
- duty of trustee to allow fund, so far as not needed, to accumulate, 58 C 210
- where trustee had power to apply legacies “as she sees fit” during life, *held* to convey full discretion, 63 C 58
- may expend in advance at once; may expend part and invest balance, expending from time to time as she sees fit, 63 C 58
- on failure of trustee to exercise an honest discretion, beneficiaries may obtain relief either from Probate Court or in equity, 63 C 58
- where trustee has full discretion, that discretion honestly exercised controls, 63 C 58
- where trustees are directed to apply income to use of A, and such part of principal as they deem best, discretion only extends to principal, 72 C 45
- power in trustee to pay over any part of estate at his discretion, 76 C 447
- where trustees in their discretion pay part of principal, it is finally withdrawn from trust, 78 C 498
- power in trustees to appropriate principal, if income insufficient for support of beneficiaries, *held* to cease when death of one beneficiary destroys equality of others in bequest and will directs severance of principal at that time, 78 C 512
- only amounts reasonably necessary for support and education payable during minority to granddaughter where testator expresses belief careful spending of income during minority of granddaughter would provide for her heirs, 90 C 517
- where cestui has discretion to use principal, trustee must accede to all reasonable demands without court order, 91 C 463
- discretion of life tenant to call for part of the principal that may be necessary for her support under terms of the will continues after she resigns the trust, 91 C 463
- meaning of “necessary” for life tenant’s support, 91 C 463
- where trustees are given discretion as to expenditure of income for the support and education of a minor, they must make the expenditures, and not turn money over to minor’s guardian, 96 C 181
- gift in trust to use income for care, education and support of grandchildren, principal to be paid in four instalments at ages of twenty-five, thirty, thirty-five and forty, with right of trustees to “decline to make such payments or reduce them” *held* to give trustees discretion as to income as well as principal, 98 C 357
- trustees cannot pay over entire income to guardians of children, 98 C 357
- withheld income might be used at later period or if not be added to last payment of principal, 98 C 357
- “pay over,” “pay over and apply,” and similar phrases, *held* to have same meaning, 98 C 365
- whether discretionary power to expend principal of trust for beneficiary survives to successor of trustee is question of intention, 100 C 15
- where power was to continue throughout life of son of testatrix and she named husband trustee, *held* power survived, 100 C 15
- not an absolute and arbitrary discretion but calling for exercise of judgment by trustee, 100 C 15
- equity could compel trustee to exercise judgment in proper case, 100 C 15
- where gift provided for distribution of income to son and “his family” and power to advance principal was to or for benefit of son or “his wife and children,” *held* that on his divorce and remarriage second wife was beneficiary, 100 C 15
- giving absolute discretion to trustee does not necessarily prevent equity from acting, 100 C 26
- gift in trust for son during life for support of himself, wife and family in such proportions as trustee deems best, at his death income to go to wife until death or remarriage with gift over to his issue; substituted trustee takes trust with same powers and duties as original, 110 C 117
- where testatrix gave son right to receive net income and then gave trustees right, in certain contingencies, to terminate payments, further provision permitting them to apply income to support of son, *held* to apply only where payments to him have been terminated, 113 C 316
- provision that trustees might use both income and principal for son if need arose, *held* not dependent on contingencies, 113 C 316

residue left to trustee to pay income to son B with authorization to withhold any part not necessary for his comfortable support, principal to go to his issue; B divorced and remarried, and conservator appointed for him in Connecticut at testatrix' behest; B now domiciled in New York, 119 C 131

—payments to be made directly to B so long as he is free of conservatorship at his domicil, 119 C 131

—trustee to pay B only such part of income as is necessary for comfortable support, 119 C 131

—payments to be proportionate to extent of the necessity and in determining amounts trustee should consider B's income from other sources, 119 C 131

—in exercising its discretion, trustee should consider fact that B is living with and supporting wife (but see dis.), 119 C 131

—fact that testatrix by codicil excluded issue of second wife from bequests to grandchildren nil sig., 119 C 131

—withheld income should be accumulated with principal fund, not in separate fund to become part of B's estate (but see dis.), 119 C 131

—incumbent on B to give trustee such information as it may require to exercise its discretion, 119 C 131

—trust is spendthrift and assignment of income to S for legal services ineffective, nor could it be regarded as order or contract in futuro to pay debt out of accumulated income, 119 C 131

—trustee may pay to B income accumulated during settlement of estate as it finds it necessary for his support, 119 C 131

construction of trust for benefit of grandchildren G, later modified to include after-born grandchildren M, 121 C 1

—M children entitled to share in income as well as principal distributions, 121 C 1

—trustees have discretion whether they shall expend for support, etc., of each child entire sum designated for any year, 121 C 1

—equality of benefit requires that the same sum be set aside each year for the M as for the G children, 121 C 1

—any excess of income becomes part of principal as general fund, 121 C 1

—fund not to be divided into parts but to be retained as entity, 121 C 1

—should income prove insufficient to make yearly payments, amount for each to be reduced pro rata, 121 C 1

—but any deficiency may be made up from excess accumulated in previous years, 121 C 1

—each of M children entitled to same payments of principal when they become

twenty-one and twenty-five as is provided for G children, 121 C 1

—when trustees were "authorized" to make the principal payments, they were given power to withhold them in their discretion, 121 C 1

provision that two-thirds of income from residue be payable to testatrix' son in discretion of trustees but in no case such payment to be less than \$400, construed to entitle son to \$400 though part of principal had to be taken, 122 C 50

while court will not interfere with discretionary power vested in trustee, in absence of fraud, bad faith or abuse of discretion, trustee may seek its advice as to legality of action it proposes to take, 126 C 665

where trust contained power to use income or any part of principal for benefit of wife during life, in discretion of trustee, but no part of income was so used, executors of her estate have no claim on it, 126 C 666

in exercising discretion to determine amount of income from testamentary trust necessary to support of testator's daughter, trustee should take her personal estate and income from other sources into account, 127 C 207

where certain income payable to son or such part as trustees deem necessary for his support, money should be paid to him, not expended by trustees for him, 127 C 655

§ 15. Appointment, Acceptance and Removal of Trustee

acceptance of trust by will may be shown by conduct, 12 C 473

—as from taking bond in trust and bringing suit, 21 C 519

—not estopped in such suit by previous refusal to accept, if no change in circumstances of parties resulted, 21 C 519

chancery will change or supply trustee, if necessary, 31 C 257

devise to "executor hereinafter named," in trust, is as valid as if to him by name, 32 C 570

language *held* to exclude executors from trusteeship, 40 C 250

testamentary trustees are amenable to Superior Court when, 45 C 111

provision for the nomination of a trustee to the judge of Probate Court, by at least one-third "the devisees above named"; *held* those only who were to take at the termination of the trust were the "devisees above named," 54 C 320

statute by implication gives to testator the power not only to appoint testamentary trustee but also to provide for filling vacancy, 54 C 325

—Probate Court could doubtless reject an incapable or dishonest nominee, 54 C 325

§ 15 Trusts

—but mere nonresidence is not per se a sufficient cause for rejecting the nominee, 54 C 325

charitable bequest, in trust, will not be allowed to fail because trustee named declines, 54 C 345, 67 C 237, 71 C 122

under provision de filling of vacancies in trusteeship upon death or resignation, a refusal to accept trust creates vacancy like resignation, 56 C 208

in acting on acceptance of resignation of trustee, Court of Probate need not notify remaindermen, 58 C 332

no one can compel another to accept a trust by naming him as trustee, 60 C 314

—refusal to accept would not defeat trust unless so provided, 60 C 314

statute does not strip Superior Court of jurisdiction to appoint a testamentary trustee, 60 C 314

—but action will ordinarily be left in such matter to Probate Court, 60 C 314

—Superior Court only acts where trust would otherwise be defeated, 60 C 314

any individual of a class benefited by a trust may apply for appointment of a trustee, 60 C 314

if a trust is properly created it is not defeated by disability, death or nonappointment of trustee, 60 C 322

legacies to widow to be used in caring for and helping certain named beneficiaries “as she sees fit”; remainder over in case wife died intestate; *held* widow took as trustee, each legacy upon a separate trust, 63 C 58

—and that before entering on trusts she should give probate bond, 63 C 58

—if she should decline trust, Probate Court could designate successor for life of widow, 63 C 58

—widow had power to appoint trustee of residue, of all or any of legacies and prescribe reasonable mode of applying same to beneficiaries, 63 C 58

provisions of will *held* to show intention of testator to have two trustees, 63 C 278

—where there was a sole trustee by appointment, *held* Probate Court could appoint a cotrustee, 63 C 278

*—where will provided that vacancy should be filled by Probate Court with advice of surviving trustee named, *held* trustee by appointment could not act on appointment of cotrustee, 63 C 278

—Probate Court alone could appoint in such case, 63 C 278

“I hereby appoint P trustee of my estate,” *held* sufficient to give a legal title to trustee named, 63 C 300

gift to “trustees” of Baptist church; deacons were often spoken of as “trustees”; *held* that they and their successors took funds in trust as individuals, 63 C 377

—but if not that equity would appoint a trustee, 63 C 377

if life tenant fails to perform trust, trustee may be appointed, 65 C 227

State may be trustee for home for idiots, 67 C 245

gift to State, with gift over, if not accepted; acceptance is condition precedent; must be by Legislature; defeat of motion as refusal, 69 C 64

where trustee dies, his executor should at once turn over estate to his successor, 69 C 257

clause conferring unauthorized jurisdiction on Court of Probate is void, 69 C 702

—court, in appointing, should regard wishes of persons interested, 69 C 708

whenever trustees of vested remainder have or may have immediate active duties to perform, they are entitled to qualify without waiting for termination of life estate, 70 C 511

if two are named and only one qualifies, he becomes sole trustee, 70 C 511

where testator gives restricted power to surviving trustees to fill vacancy from two persons, then, by codicil, appoints one of two a trustee, power fails, 72 C 494

directions imposing duties of trustee on executor entitle him to qualify as such, 73 C 56

change of capacity by executor appointed trustee in will, 73 C 443, 77 C 71, 85 C 245, 86 C 402

where executor, also named trustee, accounts as former and files bond as latter, he becomes trustee when, 73 C 443

where validity of trust provision is doubtful, Probate Court should appoint trustee; wider power of Superior Court on appeal, 74 C 588, 77 C 705

a trust never fails for want of a trustee, 74 C 588, 92 C 466, 98 C 682, 101 C 528, 110 C 524

power in trustee to take trust acquired after testator's death justifies appointment, 74 C 599

discretion of court as to removal; lax methods of doing business, 77 C 247

surviving trustee cannot appoint his successors unless will or instrument so provides, 84 C 494

donor of power in a trust can determine how vacancy in trust will be filled, 84 C 499

not assumed that testator will create a trust without naming trustee or confine trustee to one out of several trusts created, 85 C 245

—nor that he will leave a gap in the administration of the estate, 85 C 245

on acceptance of administration account executor becomes trustee, 85 C 245

—acceptance presumed from acting as executor; no transfer of property necessary, 85 C 245

if no trustee is named in a will executor should act as trustee, 85 C 245

property left to wife for life, then income to J for life after he is twenty-one, then to J's lineal descendants or their representatives, with provisions in case J died without descendants; R appointed executor of will, and L trustee of estate; R should settle estate and turn it over to L, 85 C 245

acceptance by trustee is a question of fact; no action necessary, 86 C 402

questions relating to giving bond and appointment of trustees are for Court of Probate only, 86 C 631

trustee might be appointed for a gift to a charitable organization legally incapable of taking it, 90 C 592

where personal property is given for life, life tenant is trustee, 91 C 463

—her successor possesses all the powers devolved upon her by will, 91 C 463

under statute, where the original trustees were dead, and where there had been a change in the situation since creation of trust so that it could not be carried out, Superior Court appointed a trustee to sell property of the trust, 92 C 467

Probate Court could not appoint trustee where original trustee dead, and no provision in will creating trust for new appointment, because statute gives this power to Superior Court, 92 C 467

—Probate Court can appoint a trustee only when there is no provision for such appointment by law or in the instrument creating the trust, 92 C 467

national bank may act as a trustee, 94 C 648

where executor also named trustee, *held*, not to be acting in latter capacity when estate not settled and duties as executor not finally performed, 106 C 602

where named trustees have declined to act or become incapacitated Probate Court should designate others, 106 C 604

power to remove fiduciary for neglect discretionary; not reviewable unless abused; purpose of statute authorizing it, 107 C 535

filing untrue inventory and mingling funds reprehensible; but removal may be denied if of no benefit, 107 C 535

courts have no occasion for interference with investments made by trustees within discretionary powers vested in them except if bad faith or abuse of discretion, 116 C 588

—in case calling for interference appropriate action is for removal of trustee and substitution of another, 116 C 588

Probate Court did not abuse discretion in failing to remove trustee for alleged maladministration, 117 C 573

petition for removal of trustee who as executor and trustee had made and renewed loans to take up margin accounts of testator and

protected loan of third party which testator had secured with collateral, 117 C 573

—as all acts were done in good faith, with approval of Probate Court and to avoid selling securities at depreciated prices which testator had intended as permanent investments, *held* no cause for removal, 117 C 573

—and petitioners foreclosed from objecting to acts of executor by not appealing from approval of final account of which they had notice, 117 C 573

insolvency or bankruptcy not per se a legal disqualification of trustee, 117 C 584

court could appoint another trustee where one named in will died before testatrix, 120 C 77

§ 16. Control and Management of Property

§ 17. —In General; Powers and Duties of Trustee

cannot change his trust relation without consent of cestui que trust, or court of equity, 12 C 127

trustee is bound to apply for all necessary orders, 45 C 111

trustees may exercise a sound discretion to protect interests of cestuis, 52 C 360

—may accept a trust deed for security of claim, 52 C 361

—such acceptance by trustees of savings bank *held*, under circumstances, to be in good faith and without negligence, 52 C 361

—and where a receiver was afterwards appointed *held* he could not repudiate such acceptance, 52 C 361

state treasurer as trustee for railroad bondholders may exercise wide discretion within his powers, 53 C 333

division of income of trust fund among several beneficiaries; provision *held* to constitute a single trust and to be managed as such, 58 C 223

foreign trustee *held* not entitled to custody of portions of nonresident beneficiaries, 58 C 223

powers inferred from usage when, 76 C 302

where no provision for forfeiture in case of violation of the trust, *held* the residuary devisees could not authorize trustee to change trust property, 85 C 310

trustee of collateral to secure bonds of corporation which becomes insolvent alone can administer the collateral in accordance with the trust agreement, not the receiver, 89 C 645

—but trustee can avail himself of the machinery of the insolvent corporation and the services of the receiver, 89 C 645

trustee of collateral to secure bonds can collect them as he sees fit and can compromise claims, 89 C 645

—whether the “default” was that of a going concern or not is immaterial, 89 C 645

§ 17 Trusts

- court cannot order a receiver to do it instead of the trustee, 89 C 645
- equity can restrain abuse of power by trustee but cannot control exercise of legal discretion under trust agreement, 89 C 645
- right of trustee of property for life to use principal for permanent improvements, 91 C 464
- beneficiaries of a trust can insist upon payment by trustee of taxes, insurance, and repairs, 91 C 620
- to maintain a home, trustees must use such care and attention as is reasonably necessary to preserve the property in substantially the same physical condition as at testator's death, 95 C 122
- more care required than that necessary to keep it from decay, 95 C 122
- apportionment of expenses for maintaining property remains fixed and constant; cannot rest on a variable or changing basis, 95 C 122
- trustees must pay taxes on property, 95 C 122
- while life tenant did not occupy house, the trustees were not required to run the greenhouse except to care for the trees and plants that were part of the equipment of the trust estate, 95 C 122
- expense of carrying on a farm, though unprofitable, is chargeable against the trust funds, 95 C 122
- trustee must use ordinary prudence, 95 C 148
- must first collect assets, 95 C 148
- need not expend funds unless there is an estate to pay them; can demand indemnity for expenses, 95 C 148
- can act through agents or attorney, 95 C 148
- is responsible for their acts; but cannot delegate his duties, 95 C 148
- right of trustee to recover personal loans made as advances in excess of income, to meet beneficiaries' needs, 95 C 587
- as a general rule, trustee cannot profit by use of trust funds, 98 C 375
- presumption that one in fiduciary capacity and under order of Probate Court acted within his authority, 105 C 218
- trustee bound by requirements of ordinarily prudent business management, 105 C 274
- where testator gives bulk of estate to trustee to carry on his business, *held* executors have implied power to carry it on during settlement of estate, 106 C 602
- provisions forbidding sale of property will not be taken to prevent creditors of business coming upon it, 106 C 602
- he must be taken to have subjected it to danger of loss in this way, 106 C 602
- if primary object of testator in establishing trust is to carry on business, impossibility of doing this will not defeat object but

property will be invested and income used for annuities and principal distributed when trust terminates, 106 C 602

devise of farm, to be sold at expiration of ten years or sooner if all beneficiaries agree, income to be paid to them until then and proceeds of sale then to be distributed to them did not create two funds, income and farm, 108 C 339

—one fund with directions for investment and management, 108 C 339

trustee not confined to very letter of trust provisions; may adopt measures and do acts which are implied; this discretion is subject to control of court of equity, 116 C 320

—and in emergency court of equity may even authorize trustee to depart from terms of instrument, to preserve trust and protect beneficiaries, 116 C 320

important power of court of equity to raise implications growing out of state of trust property, purposes to be accomplished and mode adapted to that end, without violence to or forced construction of instrument, 116 C 320

court order authorizing trustee of mortgage securing many small noteholders to bid in property at foreclosure sale to protect interests from sacrifice, based upon implied powers in trustee, and justified by situation, 116 C 320

trustee's duties under mortgage securing many small noteholders were active until default and consummation of foreclosure; duty not terminated then; trustee bound to use care and diligence in protecting their interests, 116 C 320

—and if upon foreclosure trustee had stood by and permitted property to be sold for fraction of value it would be exposed to charge of wilful default, 116 C 320

—after bidding in property same considerations dictate that trustee hold and manage property until it can be sold without sacrifice; trust continues active, 116 C 320

—ability to confer these rights within equity power of court, and correctly exercised by refusal to grant prayer for sale and distribution forthwith, 116 C 320

—right and duty subject to termination at instance of trustee or noteholder when conditions warrant, 116 C 320

—independent resulting trust not created, 116 C 320

courts of equity possess broad powers to advise fiduciaries concerning their powers and duties, including construction of instrument, 116 C 588

—but will not interfere in exercise of discretionary powers in absence of fraud, bad faith or abuse of discretionary powers, 116 C 588

especially in respect to matters which testator has expressly confided to trustees selected by him, judgment of court will not be substituted therefor except in case of abuse, 116 C 588

court may review exercise of judgment and determine whether trustee has exceeded liberty given him, 116 C 588

power to make loans at bank to take up margin accounts of testator, 117 C 573

when deed of trust drawn in interest of trustee, it is trustee's own language to be interpreted and words should be interpreted most strongly against him, 123 C 591

—rule analogous to that in construction of insurance policies, 123 C 596

language will be used in its entirety, to gather from general scheme what intention was, 125 C 352

basis of action by courts in permitting deviations is necessity to preserve estate, not administration more beneficial to beneficiaries, 125 C 353

title of trust fund under will and right to receive it upon distribution is in trustees, 127 C 113

widow's duty to insure buildings of which she was left life use with provision that she pay taxes and "upkeep"; trustees' duty if she fails; reimbursement if widow dies before policy expires, 127 C 653

duty of trustees holding property for remaindermen to insure buildings, 127 C 661

implied powers of trustees; are subject to control of courts, 128 C 369

right of trustee to compensation for property taken for a public use, 129 C 106

§ 18. —Sale; Lease; Mortgage; Pledge

general reference in deed to authority to sell real estate sufficient, 27 C 520

testamentary trustee need not recite his authority in deed, 32 C 342

—discretion; sale before absolute necessity held valid where made in good faith, 32 C 342

if authorized by will to convey all the estate in his discretion, may convey part, 36 C 187

a will authorizing trustees to sell property and invest proceeds, held to confer only ordinary rights of trustees, 61 C 88

power of trustee to convey legal title to estate, 76 C 295

pledge of stock by life tenant of equitable interest, under authority of trustee, followed by tenant's death, and transfer by trustee of all effects held in trust to executor of donor; latter's rights, 77 C 225

power of trustee to mortgage real estate under order of court, 77 C 411

right of trustee of remainder, with power of sale, who is also life tenant, to convey estate in fee, 80 C 459

—right to and custody of proceeds of conveyance, 80 C 460

where gift is made to trustees, with power of sale, income to be paid to themselves, and only one qualifies, sale of land must be under statute as to sale of trust realty, 80 C 673

where trustee has power of sale, if necessary for purpose of trust, order of court for sale only has effect of determining that necessity, 81 C 171

presumed, in absence of other evidence, that sales by trustee under power were properly made, especially where sole beneficiary acquiesced, 81 C 171

State can authorize trustee to sell trust property and purchase other property for same trust, 85 C 310

—power is judicial, not legislative; must be exercised through the courts, 85 C 310

trustee cannot sell real estate to make distribution of fund easier unless court orders it, 89 C 283

authority to sell and convey unless restricted implies authority to alienate at discretion, 91 C 620

where fund is left to accumulate, income cannot be used for taxes, insurances, and repairs, but unlimited power of sale permits disposition of unused land and use of proceeds, 91 C 620

trustee should convey leased property at end of trust free of lease and, for that purpose, can give notice to tenant to quit, 91 C 667

power of court to order trustee to sell land where a change of circumstances requires it, 92 C 466

—can appoint trustees to succeed those who died without selling the land, 92 C 466

if life tenant sells, under power, devised property, he must use good faith and get best price; situation is the same as if he were a trustee, 94 C 363

power "to charge" real estate may or may not include power to mortgage it, 95 C 102

—no such power implied if it would defeat purpose of the trust, 95 C 102

equitable lien of one who advances money on mortgage trustee had no power to give, 95 C 110

power to sell, lease and convey does not give power to mortgage, 105 C 263

—but this may be secured from Probate Court, 105 C 263

—so prohibition on trustees not to sell land after five years ends their power to do so under will, 105 C 263

—but does not prevent Probate Court authorizing it, 105 C 263

property left in trust for carrying on business subject to sale for payment of business debts, 106 C 602

sale of property under statute, 108 C 259

§ 18 Trusts

- provision in will that trustees “retain unsold” homestead prohibits sale under statute containing limitation to situations where sale not prohibited by terms of will, 108 C 259
- but where purpose stated in will was home for husband, son and sister-in-law and husband renounced all interest under will and son and her sister-in-law notified trustees that they did not desire to occupy homestead, sale was permissible under statute authorizing it in case of “change of circumstances,” 108 C 259
- effect of that statute, 108 C 259
- provision as to sister-in-law that it is “my wish” that she be allowed to make home there so long as husband or son occupied, construed as giving her mere privilege dependent on occupancy by husband or son, 108 C 269
- power to lease implied from direction to hold, manage and care for real estate, 109 C 187
- extent and limitations of power to lease, particularly with reference to duration, 109 C 187
- in case of doubt trustee should apply to Superior, not Probate Court for advice, 109 C 187
- court may authorize mortgage subject to authority from Probate Court but mortgage should be confined to particular property involved, not others in trust, 109 C 187
- provision for sale “forthwith” upon happening of certain contingency means as soon as reasonably possible in view of trustee’s duty to secure best price reasonably obtainable, 110 C 526
- duty of trustee as to sale and right of cestuis to submit offers, 110 C 526
- where trust agreement gave no right to mortgage, attempt to create one is illegal and invalid, 114 C 272
- will forbade sale by trustees of stock in N Company and trustees asked advice as to their power to exchange it for stock in new company in proposed reorganization, 118 C 509
- request for advice *held* not prematurely made, 118 C 509
- and as nature of business, corporate objects and proportionate stock ownership in new corporation would not be changed, change effected would be of form not substance, 118 C 509
- and exchange of stock would not conflict with testator’s underlying purpose that his interest in this business be not sold, 118 C 509
- prohibition in will would remain applicable and effective as to the new stock received, 118 C 509
- and there would not be such change in investment as would make inapplicable stat-

utory authority of trustees to hold stock in new corporation as securities received from testator, 118 C 509

decree that trustee sell real estate, made without issue being before court or application for sale, and where trustee not a party, void, 120 C 77

§ 19. —Investments

trustee may subscribe to increase of stock by company in which he holds shares in trust, 50 C 66

—such right and increase belongs to capital of fund, 50 C 66

statute de investment of trust funds is not mandatory, 61 C 87

—if trustees invest in securities approved by statute they will be protected except under very extraordinary circumstance, 61 C 87

—other investments by trustees may be justified under the rules, 61 C 87

a will authorizing trustees to sell property and invest proceeds *held* to confer only ordinary rights of trustee, 61 C 88

—must invest under responsibilities usually attaching to a trust, 61 C 88

where account brings improper investments to notice of court, duty to require substitution of other securities, 73 C 442

where trustee is directed to hold certain sum, he need not sell stock to make up that sum, but may retain investments received, 76 C 561

trustees authorized to hold securities as turned over to them, so long as in exercise of reasonable prudence they may deem it unnecessary to make any change, 76 C 564

direction to trustee to convert stocks and bonds into trust fund investments “without loss”; effect of statute permitting trustee to retain stocks received; purchase of bonds at premium, 79 C 555

acceptance of account showing departure from terms of trust as to investments does not justify further departures to prejudice of remaindermen, 79 C 555

trustee cannot invest in shares of trading company, 80 C 402

trustee cannot retain income from life tenant to make good depreciation in premium on bonds left by testator and properly retained, 80 C 540

trustee cannot invest money in purchase of stock on margin, 89 C 229

prohibition against investment in railroad bonds or in corporation not located in Waterbury, does not include state or municipal bonds, 105 C 263

trustees cannot ordinarily invest funds in making permanent improvements to real estate in absence of authority in instrument creating the trust, 109 C 187

—will construed and *held* to point to intent of testator not to have such improvements made, 109 C 187

—but Superior Court may authorize acts not within intent of testator where it is necessary to preserve estate, 109 C 187

—this power is dependent on reasonable necessity, not on fact that thereby trust could be managed to better advantage of beneficiaries, 109 C 187

—hence where building was largely destroyed by fire, court could authorize new building, 109 C 187

—matter is one primarily for trial court to determine in view of necessity of full inquiry, 109 C 200

—court may authorize mortgage subject to authority from Probate Court but mortgage should be confined to particular property involved, not others in trust, 109 C 187

—statute as to investment of money derived from mortgage “in investments authorized by law” means not only authorized by statute but by general principles of law, 109 C 187

—hence in this case would include permanent improvements, 109 C 187

fiduciary may continue the investment as it came to him unless ordered otherwise by Probate Court or instrument creating trust, 115 C 26

—but this right must be prudently exercised and trustee cannot escape responsibility attaching to trustees generally for safety of funds in his control, 115 C 26

courts have no occasion for interference with investments made by trustees within discretionary powers vested in them except if there is bad faith or abuse of discretion, 116 C 588, 117 C 583

—in case calling for interference appropriate action is for removal of trustee and substitution of another, 116 C 588

will left investment of trust fund to discretion of trustees; one wanted to invest money in in bank in mortgages and the other in bonds; *held* court could not advise as to investments, 116 C 588

—but had complaint alleged refusal of trustees to exercise their discretion it might afford ground for removal, 116 C 593

authority to trustee to make investments and reinvestments as it might deem wise, *held* to disclose intent that trustee should not be bound by statutory requirements, 117 C 579

—trustee entitled to retain investments made by testator until otherwise ordered by the court, 117 C 579

where testator authorized trustees to invest and reinvest fund in real estate and mortgage bonds or in such other “securities”

besides those recognized by law as they considered safe, *held* securities included bonds, debentures, preferred and common stocks, rather than only those secured by pledge of collateral, 122 C 384

power to invest in preferred stock upon which the full prescribed dividend has been paid for five years preceding the investment, 125 C 349

—construed to include preferred stock outstanding less than five years which replaced previous issue where two issues together have paid dividend for five year period, 125 C 349

provision for investment in stock upon which cash dividends of 4 per cent on par value have been paid for five years construed not to include no par stock though invested capital thereof could be definitely ascertained, 125 C 349

security is first principal in investment of trust fund and speculation is not permitted, 125 C 352

§ 20. —Cotrustees; Successive Trustees

rights of surviving trustee appointed to preserve legal estate for voluntary association, 20 C 459

—such trustee may sue the association in ejectment, 20 C 459

where trust providing for discretionary disposal of estate for support is in two persons, their action should be joint, 37 C 384

discretion to terminate trust period, if once exercised by trustee named, does not pass to his testamentary trustee, 61 C 66

should widow decline trust created by will Probate Court should appoint successor to hold during her life, 63 C 58

—such appointee to apply money for beneficiaries as widow should from time to time direct, the will giving her power to apply legacies “as she sees fit,” 63 C 58

if one of two named as trustees declines or fails to qualify, the other may qualify alone and execute trust, 70 C 511

power in trustees to fill vacancies in their number falls where testator later makes such appointment impossible, 72 C 494

gift in trust to executors; effect of change of executors, 72 C 502

duty of removed trustee to pay over principal to his successor, 80 C 466

effect of Probate Court's acceptance of an account that does not include funds not turned over by ancillary trustee, 82 C 33

trustee must turn over funds to successor though he holds as ancillary trustee in another jurisdiction, 82 C 33

an absolute and final discretion in disposing of trust funds is personal and does not devolve on successor, 82 C 195

§ 20 Trusts

- disposition of trust income may be separable and pass to successor, 82 C 195
- a discretionary power conferred upon a trustee *held* not to be personal, but to pass to trustee's successor; its exercise reviewable, 83 C 655
- naked power uncoupled with a trust must be exercised by all of the trustees; if one dies, survivors cannot execute it, 84 C 494
- surviving trustee *held* without power to appoint a successor, 84 C 494
- whether court of equity could do so, *quaere*, 84 C 494
- if original trustee was required to exercise a power, it can be exercised by his successor, but if it depended upon his discretion and will, it terminates at his death, 90 C 461
- where trustee is empowered to make inquiry into character and business relations of beneficiary, his successor can do likewise, 90 C 462
- a former trustee who has resigned and been superseded by another appointee has no interest in the trust estate, 91 C 444
- successor of life tenant as trustee possesses all powers devolved on her by will, 91 C 463
- terms of trust *held* to give no discretion to original trustees that did not descend to their successors, 92 C 467
- power to sell survives to successors, 92 C 467, 472
- survival of discretionary powers to successor of original trustee, 100 C 15
- tendency of recent judicial authority, 100 C 15
- substituted trustee takes trust with same rights and duties as original, though trust provides for distribution of income in such proportion as trustee deems best, 110 C 117
- direction that income of trust for Sunday School library be expended under direction of pastor and superintendent does not impose such personal discretion that other persons might not be authorized to act, 116 C 347
- court will make necessary order, 116 C 347
- application of one cofiduciary to compel delinquent trustee to pay out estate in his possession or account for it will be entertained by court of equity, 116 C 588
- gift for erection of chapel in cemetery did not give rise to such a personal discretion that successor trustee could not be appointed to effectuate intent, 126 C 289
- in determining whether power to exercise a discretion given trustee will pass to successor, question is one of intention as disclosed in instrument, 128 C 204
- if it discloses no special confidence reposed in trustee and discretion can properly

- ly be exercised by successor and his action reviewed by court of equity, power will be held one which passes, 128 C 204
- where B deeded property to himself as trustee to turn over to grandson at age of thirty-six “if he is personally deservant,” *held* power could not pass to successor and trust failed on B's death, 128 C 205
- oral statements made by B when he executed deed, nil sig., 128 C 209

§ 21. —Suits By and Against Trustee

- trustee to whom promise is made should sue, 14 C 445
- statute de suit by trustee of an express trust, 62 C 257
- trustee's right to bring interpleader as to fund; to apply to court for advice; right to charge expenditures in former case to fund, 72 C 86
- power of equity to protect trustee from action, 73 C 325
- whether a survivor of several trustees could have paid over the property is to be determined in a suit at law by the grantor rather than in equity, 84 C 494
- general denial of acceptance of appointment is not enough to raise question of right to sue as trustee generally, 86 C 402
- in suit by trustee, defendant cannot set off debt due him from plaintiff personally, 86 C 548
- whether A should receive income of trust fund should not be tried in suit for construction of will but in action against trustee, 88 C 387
- rule that beneficiary cannot sue for wrong to estate until trustee had refused to act is relaxed in equity, 102 C 97
- particularly where trustee is implicated in wrong and demand would be useless, 102 C 97
- this objection must be pleaded, 102 C 97
- action for declaratory judgment to determine whether stock dividends are principal or income, improper, as suit by trustee for advice would serve purpose, 128 C 427
- but since action was treated as one for declaratory judgment, allowances for expenses and counsel fees not made, 128 C 427

§ 22. Breach of Trust

§ 23. —In General

- diversion of fund to unauthorized purpose is illegal, 3 D 450
- personally liable on covenant exceeding powers, 5 D 92
- cannot act for his own benefit in contract relating to the trust, 11 C 342
- liable for interest if refusing to account for profits, or unable, from commingling, 48 C 207

in a mere naked trust, estate of trustee *held* not answerable for discount obtained by intermediate purchaser of prior mortgage, 56 C 284

sale of stock in violation of terms of trust; brokers acting without knowledge, actual or constructive, *held* not chargeable, 58 C 332

—aliter, where they had knowledge or were chargeable with it, 58 C 332

—bound to inquire de ownership of property, knowing it to be trust property, 58 C 332

—where will is on record brokers *held* bound to know the rights of heirs, 58 C 332

—immaterial that remainder was in doubt as to validity and that property had never been distributed, 58 C 332

—immaterial that stocks sold were received as security and sold to make good losses, 58 C 332

—property bought and added to trust fund in place of that sold *held* to be trust funds, 58 C 332

investment of funds in mortgage on land in another State; due diligence; burden of proof and damages where lawful investment is changed to unlawful; compounding interest, 67 C 187

if trustee makes unlawful investments, court can order that they be replaced, 73 C 442

effect of paying over more than trust specifies in anticipation of final distribution, 77 C 214

if income is diverted to pay charges against principal, it must be restored, even though this requires sale of principal, 77 C 411

intrusting unsuitable person with legal title, 80 C 411

where trustee threatens to misappropriate "safety fund" of insurance company, certificate holders entitled to incidental relief against trustee, 80 C 681

where grantee takes deed under oral promise to hold land in trust and sells it for his own purposes, his liability is personal and attaches to his estate, 81 C 433

a bank need not supervise trust funds deposited with it or follow their withdrawal, but it cannot knowingly participate in their misappropriation, 82 C 10

previous maladministration does not destroy right to accept property, 82 C 188

avowment that a trustee reported sale of trust fund that was false does not set up conversion of trust fund to his use and is demurrable, 83 C 75

a retail coal merchant, trustee of a public school which receives aid from the State, *held* not prohibited from supplying it with coal, 85 C 23

where trustee improperly reinvests the funds, beneficiary is entitled to benefits derived therefrom, 85 C 279

one is charged with knowledge that securities belong to a trust estate when it so appears on their face, 89 C 226

opening an account with a bank or broker in one's own name as "trustee" does not thereby put depository on notice that a trust exists, 89 C 226

third parties who knowingly aid a trustee in diverting property are accountable for it, 89 C 226

corporation officer, misusing funds for own use treated as a trustee, 94 C 597

trustee must pay interest on money wrongfully withheld from beneficiary, 101 C 401

—no excuse that money deposited with attorney pending litigation over account, 101 C 401

presumption that executor becomes trustee when his duties as former are virtually complete, 105 C 230

where same person is appointed executor and trustee, that he has filed final account before a defalcation, which has been accepted after it, does not make him holder of funds as trustee at time of defalcation, 105 C 230

—as defalcation came before acceptance of account, doctrine that where a person owes money in one capacity to himself in another it is regarded as paid is not applicable, 105 C 230

—no change of capacity where he continued to treat funds as executor and no fund was identifiable as in the trust, 105 C 230

—finding that funds still held as executor, how far reviewable, 105 C 235

trustee should not loan funds to himself or otherwise permit self-interest to conflict with duties, 105 C 322

defendant constituted trustee to complete apartment house and distribute money from mortgages; various acts *held* not wilful misconduct under agreement, 113 C 429

—statements and actions of trustee *held* not to render him personally liable for materialman's bill, 113 C 429

fact that trustee is also attorney does not mean that his obligation is to be tested as such, 113 C 429

wilful misconduct making trustee liable, as distinguished from negligence, 113 C 429

presumption that trustee has acted properly until contrary is proven, explained, 113 C 430

—merely places burden of proof upon person alleging breach of duty, 113 C 430

—if proper charge on latter subject is given, presumption need not be referred to, 113 C 430

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presumption that where acts of trustee are open to two constructions, one rightful and the other tortious, former will be accepted, 113 C 447

where profits earned by improper use of trust funds are known or can be reasonably ascertained, beneficiary of trust has option to claim them as such, 120 C 337

—if trustee refuses to account for profits or has so mingled the moneys with his own that he cannot account for the profits to the cestui, latter may have legal interest computed with annual rests, 120 C 337

—rule especially applicable where involving wilful breach of duty, 120 C 337

—charge of compound or simple interest authorized where it is difficult or impracticable to ascertain with certainty profit realized from trust fund, 120 C 337

trustee claiming benefit from his dealings with beneficiary must prove that he dealt fairly and reasonably, 121 C 85

B Company for purpose of realizing on property sold it to M Company, which its stockholders organized, which mortgaged back to B Company, and gave second mortgage to C Company, also controlled by stockholders of B Company; B Company then issued mortgage bonds to public and thereafter paid defaulted coupons from own funds without informing holders of default, 123 C 591

—primary duty of B Company trustee was to protect bondholders, 123 C 591

—in neglecting to foreclose promptly on default or to sell property trustee could not be held to have been influenced by desire to protect own interests, 123 C 591

—nor was advancement of interest for trustee's own benefit, 123 C 592

—but it committed breach of trust in failing to give notice to bondholders of default and it is chargeable with any loss to them resulting therefrom, 123 C 592

—but as bondholders were in no way harmed, to deny receiver of trustee right to present coupons on which it paid interest and share pro rata in distribution of assets in hands of reorganization committee would be to penalize him for technical default of trustee, 123 C 592

trustee must not put itself in position when its self-interest will conflict with its duties, 123 C 597

—must exercise due diligence, 123 C 597

—must communicate all material facts to beneficiary, 123 C 597

misconduct of director of corporation not such that he should be treated as if he had violated terms of express trust, with respect to Statute of Limitations, 129 C 674

§ 24. —Mingling Funds; Investing in Own Name

liable for interest if refusing to account for profits, or unable, from commingling, 48 C 207

mingling trust funds with private funds is not per se unlawful, 48 C 550

mingling by husband of wife's funds with his own; *held* that she was entitled to an accounting or damages, 104 C 169

interest to which beneficiary is entitled, when trustee mingles funds with his own, 104 C 169

if trustee refuses to account for profits or has so mingled the moneys with his own that he cannot account for the profits to the cestui, latter may have legal interest computed with annual rests, 120 C 337

trustee in investing in note or mortgage should not take security in own name; papers should bear indication on their face that they are held by him as trustee, 121 C 558

—reasons for principle: to remove temptation from trustee and to protect beneficiary, 121 C 558

—also to give notice to public, 121 C 569

—control and examination of banks and trust companies not sufficient protection to permit exception in their case, 121 C 558

—benefits from practice not of sufficient importance, and dangers substantial reason for applying rule, 121 C 558

—participation mortgages considered; interference with benefits of such investments to beneficiaries not of sufficient importance to permit exception, 121 C 558

—bank *held* guilty of breach of trust in investing trust funds in mortgages held in own name, though declaration of trust was filed, investments kept separate from banking department, etc., 121 C 558

rule of damages where trustee deposits or invests trust funds in own name, 121 C 558

—usual rule is that he is liable for any loss, 121 C 558

—where loss is due to circumstances which would have brought it about though investment had been made in name of trustee as such, result is to impose penalty; imposition of such penalty should be strictly guarded, 121 C 558

—so where bank in good faith in accordance with established practice takes mortgage in own name, files declaration of trust, and loss is due to general business conditions and would have occurred anyway, there is no reason to impose penalty, 121 C 558

—beneficiary entitled to recover such losses only as resulted from fact that defendant took note and mortgage in own name, 121 C 558

deeds to trustee need only give by appropriate recital notice to any person concerned sufficient to give him the means of ascertaining the powers of the trustee, 121 C 569

—trust instrument need not be recorded, 121 C 569

improper practice for corporation to sell securities to itself as trustee, 121 C 572

Supreme Court ruled that only such substantial damages as could be shown could be recovered for breach of trust, where bank as financial agent invested in mortgage which it held in its own name instead of as trustee, 124 C 151

—fact that property involved was worth more than the debt secured would not tend to establish such damages but rather the contrary, 124 C 151

—plaintiff's contention that it should not, in equity, be left with property on its hands because it could not legally hold it under its charter, not sustainable, 124 C 151

—nor was plaintiff entitled to counsel fees made necessary by attempt to secure something to which in law it had no right, 124 C 156

§ 25. —Purchasing Trust Property; Dealings with Cestui

cannot be both buyer and seller, 1 C 208, 8 C 145

trustee can make no profit on claims against cestui que trust, 22 C 299

a director of a company is in a sense a trustee and cannot make a profit to himself in his dealings with the company, 60 C 582, 94 C 384

transaction with cestui is voidable, not void, 64 C 126, 77 C 214

—equity will set aside only so far as interests of parties demand, 66 C 444

—trustee assumes burden of proving its fairness, 78 C 622

effect of pledge of misappropriated funds with those of trustee, 65 C 544

when a trustee can purchase trust property after it has been transferred to the beneficiary, 82 C 552

under the facts *held* proper for trustee to exchange other property for that in trust, 82 C 552

presumption of undue influence in transaction whereby trustee acquires advantage at expense of beneficiaries, 102 C 97

—where trustee, adoptive father of beneficiary, mingled funds of trust with his own for years and just after daughter came of age adoptive mother secured irrevocable deeds of trust, etc., deed set aside as inequitable and unconscionable, 102 C 97

administrator as standing in position of trustee, 104 C 271

—contract with heirs voidable if want of fair dealing appears, 104 C 271

—but prompt action is necessary to rescission and this is question of law, 104 C 271

transaction between fiduciary and near relation not presumptively fraudulent; valid if done in fairness and good faith, 105 C 685

law looks askance at every transaction between trustee and beneficiaries whereby he profits, 110 C 208

—burden is on him to show its fairness and equity, 110 C 208

—where he with beneficiaries conveyed property to S who gave back option to him in his own right, judgment in action by S to quiet title giving him right to acquire property on terms of option, entered by his stipulation in action to which beneficiaries not parties, was set aside, 110 C 208

—courts are solicitous to protect rights of beneficiaries under trust agreements, 110 C 216

sales by trustees of corporation of its property in roundabout way to corporation organized by them for less than inventory value, furnished presumptive basis for judgment for fraud, 121 C 77

—unless by evidence they rebut it, 121 C 77

—burden of proof on trustee to affirmatively show transaction was fair, 121 C 85

—court could find that inventory values were actual values, 121 C 77

—damages based on difference between that amount and prices received correct, 121 C 77

—payment to one creditor of more than pro rata share is breach of duty by trustee, 121 C 77

—trustee acting under mistake may be credited with amount creditor should have received, 121 C 77

—but where party preferred was not creditor, entitled to dividend, liability of trustee not reduced, 121 C 77

where contract or gift is claimed adversely to beneficiary in trust relation, courts of equity require convincing proof of fairness of entire transaction, and possession of full information and intentional action by beneficiary after competent advice, 122 C 49

—rule not applicable where for agreement in settlement between mother and son, containing provision that it might be terminated at any time, under which she was to hold stock in trust, later agreement was substituted giving her the stock absolutely, 122 C 48

in determining whether transaction between trustee and cestui wherein former acquires property from latter is valid, adequacy of

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consideration is important and may be controlling consideration, 122 C 58

—while there was disparity in consideration in dollars and cents, where cestui secured assured income and was freed from obligation to work for company, which he greatly desired, transaction sustained, 122 C 58

§ 26. —Actions; Trustee's Bond

conversion by trustee; cosurety on bond succeeds to trust; liability for prior conversion, 45 C 111

objection to action on probate bond as being without court's consent, pleadable in abatement only under statute, 45 C 111

bond to "execute said trust according to law"; failure to render annual account, *held* a breach, though court fails to call for account, 45 C 111

—trustee is bound to apply for all necessary orders, 45 C 111

in suit on trustee's bond, interest accruing since suit, not allowed, 45 C 111

surety on bond is liable for default in not investing or turning over funds to successor, though conversion might have been before suretyship, 48 C 207

trust fund cannot be taken from trustee without allegation of wrongful possession or administration, 56 C 239

no other security than a bond can ordinarily be required for protection of remainderman of personalty, 60 C 530

bond required by statute covers trustee's duties after termination of life estate, 60 C 542

cannot be required by remainderman of personalty to defend investments made, pending the life estate, 60 C 543

approval of probate bond relates back to filing, 73 C 435

failure to have funds forthcoming on trustee's death makes his estate and surety on bond liable, though trustee is also executor and estate is not settled, 73 C 436

bond, reciting appointment as executor and trustee, accepted when executor's final account is filed, is a trustee bond; covers subsequent defaults alone; indorsed "accepted," sufficient record, 73 C 436

advice of counsel as a defense, 75 C 555

wrongful sale of real estate; good faith no defense; effect of allowance of account of proceeds, and payment, to one eventually to benefit by trust, 77 C 70, 79 C 555

bond of trustee covers both real and personal property, 77 C 70

order of Probate Court as defense, 77 C 71

sole cestui que trust has right of action for breach of trust, 81 C 433

until a fraud can be discovered by reasonable diligence, Statute of Limitations does not run, 89 C 492, 90 C 562

fraudulent concealment by trustee of cause of action against him prevents running of Statute of Limitations, 93 C 558

Statute of Limitations does not begin to run in favor of surety on bond until after filing of final account by trustee, 93 C 558

Statute of Limitations does not run in favor of testamentary trustee, who has misappropriated funds, until his removal, and appointment of successor, 93 C 558

liability of sureties; laches; agreement to release principal which is conditional and without consideration, 93 C 558

—delay of two or three years to enforce bond not in itself laches, 93 C 558

a beneficiary who does not advance funds to recover property misappropriated by a trustee cannot make claim to that recovered, 95 C 148

a beneficiary who says she does not wish action taken against a trustee absolves one from taking such action, 95 C 148

on counterclaim for secret commissions received by trustee, *held* one was not estopped by mutual releases which were signed before the secret commissions were known of, 95 C 587

remedies for breach of resulting trust, 106 C 287

complaint for money laid out and expended, insufficient in action for breach of resulting trust, 106 C 287

cause of action based on personal liability of trustee is not action to enforce trust, but is action at law, 113 C 429, 121 C 393

when trustees of corporation in dissolution are guilty of misappropriation or misuse of funds they are jointly and severally liable, 121 C 77

—judgment will lie against one or all, 121 C 77

when testamentary trustee has filed final account it is duty of Probate Court to determine all issues involved in ascertainment of property or money due beneficiaries, 121 C 388

—but courts of general jurisdiction may entertain actions against trustees for breaches of this duty, jurisdiction being concurrent, 121 C 388

where beneficiary of trust claims breaches by trustee and demands accounting, to deny him right to prosecute action in ordinary courts because of probate proceedings on final account would be to deprive him of rights law gives him, 121 C 388

—such as right to jury trial, to attach defendant's property, etc., 121 C 388

surety on bond of deceased life tenant trustee held liable for loss due to improper in-

vestments, though account of administrator of trustee and of original testator accepted, 124 C 416

when person is party solely as trustee, judgment not *res adjudicata* in another action to which he is party in individual capacity, 129 C 67

—so finding of Probate Court, that bank was guilty of breach of trust not *res adjudicata* in action for damages for breach of trust against bank as individual, 129 C 67

§ 27. Accounting and Compensation of Trustee

general rule as to compensation of trustee, 13 C 383

commission on responsibilities allowed in special cases, 13 C 383

entitled to fair compensation, out of funds in his hands, 30 C 282

settlement of accounts of testamentary trustees is matter of equity jurisdiction, 32 C 566

application to Probate Court for relief from mistake in account, 36 C 187

trustee should charge himself with full amount ordered distributed to him, 36 C 187

failure to render annual account is breach of bond “to execute said trust according to law,” 45 C 111

approval of annual account by Probate Court is not conclusive, 45 C 111

money due from trustee, as individual, to himself as trustee, treated as paid, and interest charged, 45 C 119

is liable to account for income of estate specifically devised, 46 C 174

is chargeable with compound interest, when, 46 C 174

trustee’s account charging himself is evidence against surety, 48 C 207

trust funds retained in trustee’s own hands, treated as assets, 48 C 207

liable for interest if refusing to account for profits, or unable, from commingling, 48 C 217

—such interest to be at legal rate with annual rests, 48 C 217

trustee of railroad has no lien on property for expenses under statute, 49 C 167

—may have an equity superior to that of a prior incumbrancer, 49 C 167

—but such equity *held* not to amount to an insurable interest, 49 C 167

life tenant and trustee under will charged with certain expenditures, may be required to account annually to the Probate Court, 55 C 239

—in such account expenses of suit against administrator to recover property and suit for construction of will, may be properly allowed out of estate, 55 C 239

rule that a trustee cannot receive compensation for professional service is a rule in equity for the protection of those not in a condition to protect themselves, 56 C 303

—where mere naked trust, and trustee was counsel of cestui, *held* rule had no application, 56 C 284

—an agreement between parties to pay such charges out of proceeds of property creates a lien, 56 C 284

—professional charges in name of firm of trustee does not affect lien; lien covers both, 56 C 285

—may be for services before and after trust, 56 C 285

—may be brought into the account by executor of such trustee, 56 C 285

trustee’s account can be settled only where notice given to parties, 56 C 424

one acting in a fiduciary capacity making an overpayment by mistake may recover excess, 59 C 321

—negligence is no defense to recovery if no harm was caused to defendant thereby, 59 C 321

from what source expenses of administration are to be paid; street assessment; foreclosure of mortgage, 71 C 531

trustee who is directed to pay over certain amount for ten years, then to turn over principal, may credit against fund excess payments, 77 C 214

agreement by beneficiary to make no objection to account because of failure to reinvest at higher rate, excluded as evidence, 82 C 33

fact that majority of stockholders put their stock in a voting trust does not make the corporation liable for trustee’s fees, nor can it lawfully assume the fees, 82 C 178

corporation A formed corporation B, which issued a mortgage to a trustee; corporation B alone liable to pay trustee’s fees and A’s promise to pay is only for default of another, 82 C 178

testamentary trustee must account annually unless excused by will, 91 C 464

at the accounting parties in interest may question any item, 91 C 469

power to compel trustees to account not limited by statute requiring filing of annual accounts, 92 C 286

trustee may distribute without court order to the proper persons, 92 C 286

final account of trustee precedes disposition of trust funds but does not determine distributees, 92 C 286

—if they are known, trustee may make distribution and file a report thereof, 92 C 286

power of the court over final distribution of testamentary trust, 92 C 286

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- decree requiring trustee to file final account and to turn over the balance constitutes separate and distinct orders, 92 C 286
- may be valid as to one though invalid as to the other, 92 C 286
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- trustee's account of a certain date must be substantially as of that date, 92 C 292
- fund deposited with secretary of state as trustee for policy holders of insurance company must contribute to receivership expenses, 93 C 140
- trustee is entitled to reimbursement for expenditures and to fair compensation, even in absence of provision, 93 C 143, 97 C 606
- beneficiaries of an annuity cannot oppose claim of trustee for fees unless their annuity is threatened, 93 C 590
- on reservation as to rights of creditors under statute to reach interest of a beneficiary, *held* trustee's expenses and counsel fees were payable out of income, 95 C 216
- mutual releases between beneficiaries and trustee construed to mean that the indebtedness to trustee was not released, but only known claims arising before release was signed, 95 C 589
- income of fund for needy soldiers and sailors of the Great War is chargeable with reasonable and necessary expenses of its administration, 97 C 605
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- New York trustee need not account in Connecticut Probate Court, 100 C 518
- in suit to set aside trust, Superior Court, after rendering judgment for plaintiff, should proceed to order an accounting, 102 C 120
- in suit for advice, counsel fees and expenses payable out of entire trust fund, where all but one beneficiary contest his right to part of it, 105 C 756
- provision for fund to meet trustee's charges; how to be created and distributed, 106 C 137
- compensation of trustees upon unitary basis never adopted in this State, 112 C 491
- basis for fixing compensation, 112 C 491
- is question of fact for trial court, 112 C 491
- where there are several trustees, duty to arrange work so as to reduce time and effort required of individuals, for which they must be compensated, 112 C 497
- right of trustee to receive compensation from funds in his possession, 113 C 438
- application of one fiduciary to compel delinquent trustee to pay out estate in his possession or account for it will be entertained by court of equity, 116 C 588
- where issue involved only disposition of interest, principal fund should not be charged with expenses and counsel fees of party, 117 C 342
- right of trustee to compensation in addition to that fixed in the instrument or by statute, 120 C 322
- not entitled to ordinarily, 120 C 322
- but may be allowed additional sum for special and extraordinary services outside and beyond general duties of trust, 120 C 322
- to determine this, contract is to be taken as whole, and all its relevant provisions considered in light of surrounding circumstances, 120 C 327
- so where trustee of noteholders who foreclosed mortgage and took title, was unable to sell property because of stagnant market (1929-1934), he was allowed 5 per cent of rental income for management, though trust deed (1926) provided trustee should receive no compensation, 120 C 322
- trustee chargeable with value of property as shown by inventory, plus accretions, 121 C 77
- if he incurs loss in good faith on sale, or if property is actually worth less than inventory, he is entitled to credit, 121 C 77
- where trustee is found to have made improper investments it is duty of Probate Court to refuse to allow account until it has been corrected so as to show that trustee is holding all that beneficiary is entitled to receive, 121 C 391
- compensation for services of trustee under mortgage in management of property since title assumed by it after foreclosure, 123 C 248
- State has no statute regulating fees of fiduciaries, including trustees; matter wholly within discretion of appropriate court, 124 C 472
- discretion of court may extend to whether compensation shall be charged against income or principal or both, 124 C 472
- generally compensation out of corpus has been allowable only at termination of trust but there may be extraordinary circumstances which require departure, 124 C 472
- general practice in this State, unless directed otherwise in instrument, is to pay compensation out of income if sufficient, as lump sum either periodically or at closing of trust, 124 C 472
- annual allowance out of principal might deplete trust and defeat purposes of creator, 124 C 472

—though plaintiff engaged in continuous supervision of securities comprising corpus to end of preserving and increasing corpus, *held* nothing to differentiate services from those ordinarily rendered and it may not charge portion of annual fee against principal, 124 C 473

method of accounting which trustees should use in following course prescribed by judgment de disposal of accumulated income, 127 C 207

commission and charges of trustee ordinarily payable from income, not principal, 127 C 664

§ 28. Establishment and Enforcement of Trust

equity will execute trust, if there is a rule to guide, and trustee dies before executing it, 8 C 48

equity will enforce specific execution of trusts, 10 C 121

person having trust property with notice of the trust is bound to the execution of it, 16 C 142, 17 C 546

administratrix leaving registered bonds of estate, signed by her as administratrix, with broker for sale, may follow proceeds as trust funds, 63 C 198

—where able, may trace funds into hands of trustee in insolvency, 63 C 198

mere fact that one had trust funds seven years before his death does not impress with a trust the funds which are now in the hands of remote distributees thirty years after his death, 83 C 75

trust property that can be traced remains subject to the trust, 83 C 75

beneficiaries of a trust can in a single action put in a claim against an administrator for trust property, and on allowance have equity reclaim assets of estate to satisfy the trust, 83 C 75

no distribution, delivery or transfer by Probate Court necessary to transfer title of trust fund to trustee, 86 C 402

funds collected by the local chapter of a benefit association are trust funds that parent chapter can follow, 88 C 676

right of trustee to follow corporate stock impressed with a constructive trust, 94 C 597

—as where corporate officer buys stock with its funds for himself, 94 C 597

power of equity to compel trustee to exercise discretion vested in him and to review its exercise, 100 C 25

trust cannot be impressed upon property owned by trustee who has mingled funds with his own unless it can be traced, 104 C 171

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upon them to extent of fund if it can be traced into those assets, 118 C 492

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estate held by naked trust may be levied on for debts of cestui que trust, 21 C 148

effect of a devise in trust to pay rents and profits annually to cestui que trust, to protect land from his creditors, 36 C 18

—clause that income shall in no way enure to his creditors, *held* inoperative, 36 C 18

trust property assigned by insolvent debtor passes to assignee subject to the trust, 37 C 185

—creditors of assigning debtor have no claim to it, 37 C 185

property in trust for support of beneficiary is exempt from attachment, 50 C 495

—when court will appropriate surplus in behalf of creditor, 50 C 495

assets of company is a trust fund for benefit of creditors, 52 C 108

income of trust funds due life legatee is a debt from trustee, 56 C 441

—as such is subject to foreign attachment, 56 C 423

—payment of such income by trustee to executor of estate is not payment to legatee, 56 C 423

—distribution of such income as part of the residue of estate to the detriment of the life legatee is no payment of such income, 56 C 423

—though confirmed by Probate Court by decree to which life legatee was a party, 56 C 423

—such decree while conclusive between the distributees was not so as between the life legatee and the trustee, 56 C 423

—question not affected by an allowance granted by Probate Court to life legatee, 56 C 423

where trust for G and his family was an entire and inseparable one and fund was but a moderate provision for their support, neither principal nor income could be taken by G's creditors, 66 C 402

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—but otherwise, where trustee has discretion as to payments, 72 C 45, 78 C 81

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one's interest in a testamentary trust is attachable and assignable, 93 C 409

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—quaere whether equitable life estate may be created, with absolute right to income in beneficiary, but without power to alienate, 107 C 9

—if creditors cannot reach income under statute, beneficiary may not alienate or assign it, 107 C 9

—on reservation to determine these questions, costs should be paid from income, 107 C 9

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—discretion of trustees final unless abused, 108 C 413

—exercise of discretion and payment to beneficiary separable, 108 C 413

—maintenance and support have no fixed meaning but depend on circumstances of life of testator and beneficiary, 108 C 413

—include payment of bills after death of beneficiary, 108 C 413

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—and his estate was entitled to accrued income but not to dividend declared after beneficiary's death by holding corporation, stock of which was owned by estate, 108 C 413

—but if charges by trustees were greater than funds in their hands at beneficiary's death, his estate would have no claim, 108 C 413

trust to pay income to son with authorization to withhold any part not necessary for his comfortable support, principal to go to his issue, is spendthrift and income not liable to attachment or execution and may not be alienated, 119 C 131

creditor may bring action in which court could order trustee to pay him surplus income not required for support of beneficiary of spendthrift trust (dis.), 119 C 144

State sued trustee under will of A for expenditures made for support of C in state hospital; will provided trust fund income or principal to be spent for C's support in trustee's discretion; *held* this was spendthrift trust not subject to attachment or execution by creditors of beneficiary, 119 C 508

—nor could State recover under statute giving it right of reimbursement against person or estate, as C had no estate, 119 C 508

—nil sig. that State is not contract creditor but acted in performance of governmental duty, 119 C 511

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—and trustee here could not agree to appropriate money from trust for payment of debt incurred by C before death of testator, 119 C 508

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TURNPIKE

See **Andrews and Fowler Digest**

ULTRA VIRES

See **CORPORATIONS § 14; MUNICIPAL CORPORATIONS § 9**

UNDUE INFLUENCE

See also **DURESS; TRUSTS § 25; WILLS § 6**

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- inequity of transactions, conclusion from facts found, 102 C 111
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- so evidence of assets and condition of wife's estate, 105 C 711
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§ 1. In General

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- so employees of processor of shade tobacco grown on land of others not exempt, 125 C 300
- claim of denial of equal protection of law and due process, dismissed, 125 C 301
- regulation within permissible delegatory powers of Legislature, 125 C 301
- comparison of Connecticut act and regulations with federal Social Security Act and regulations, 125 C 304
- reason and purpose of exception of agricultural labor in federal act and regulation interpreting it were "difficulties of collecting tax," 125 C 305
- commission which drafted our bill and Legislature which adopted it assumed to have been cognizant of the parallel provision and regulation in federal act and to have intended a like meaning in our own act, 125 C 308
- to be eligible for benefits claimant must be "available for work"; ineligibility because of exclusion by claimant of certain kind of employment would arise through failure to apply for when directed or accept work determined by administrator to be suitable, 126 C 441
- claimant "available for work" though in her original registration there was notation

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- that "she does not like waiting work" and finding stated that "she does not care to accept job as waitress," 126 C 441
- if she should be offered and refuse work as waitress and administrator ruled it to be suitable, determination of effect of refusal, including validity of ruling, would be appropriate, 126 C 445
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- act is clearly within state's police power, 128 C 86
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- payment required under act is a proper tax on exercise of right to employ and a numerical classification of the nature employed in the act is valid, 128 C 220
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bona fides of mortgage an attribute to the exception, 120 C 661

—its existence could not be assumed from pleadings for purposes of demurrer, 120 C 661

existence of intent to evade usury statutes is question of fact, 120 C 671

—for purpose of demurrer to answer, allegation in latter of existence of such intent must be taken as true, 120 C 671

court’s conclusion that plaintiff did not charge in excess of 12 per cent unsupported, and its finding that bonus was charged for use of money in addition to interest conclusive that rate was in excess of that permitted by statute, 123 C 94

—commencement of action tantamount to demand for payment, 123 C 98

mere fact that amount of note exceeds sum actually loaned by amount greater than interest charge sanctioned by statute, **not con-**

clusive of intent to transgress terms, 123 C 94

—but law will tear off any disguise, 123 C 94

voluntary taking or reserving of more than legal rate of interest is per se usurious, and offense not condoned by want of intent to violate law, 123 C 94

—so no defense that plaintiff did not accept notes with intent to violate law, believing loan exempt from its provisions because secured by mortgage, 123 C 94

debtor may give as collateral security for debt another obligation of his own where that is secured by lien on property or the like, 124 C 485

question whether usurious note and mortgage represent loan or distinct obligation collateral to it one of fact; court will be vigilant to prevent any device by which statute against usury may be evaded, 124 C 485

plaintiff might be able under complaint to prove that usurious note and mortgage were given as security and that loan sued on was distinct from it; demurrer should have been overruled, 124 C 485

where provision excluding industrial banks from statute exempting banks and trust companies from usury laws was intentionally omitted in Revision of 1930 and was expressly repealed when Revision was adopted, *held* such banks not thereafter subject to usury laws, 125 C 314

—legislation not discriminatory, 125 C 314

exception of mortgage in excess of \$500 from statute applies only in foreclosure of mortgage and not in action on note, 126 C 336

note for \$1650 for loan of \$1500 at 6 per cent interest *held* to be usurious on its face, 126 C 336

—renewals of usurious note tainted with same defect, 126 C 339

inclusion in mortgage of bonus, taken with intent of exacting interest in excess of 12 per cent, does not in itself render mortgage invalid so as to take it out of exception in statute of “any bona fide mortgage” in excess of \$500, 128 C 57

—if there was present in transaction fraud, deception of mortgagor or bad faith, such circumstances might take mortgage out of the exception, 128 C 60

usury statutes apply to actions upon notes secured by mortgage and to mortgages of real property of \$500 or less; exception applies to mortgages over \$500; reason for exception, 128 C 60

§ 4. —Small Loans Act

where three made note for loan within terms of Small Loans Act, and, including its amount, two thereby became indebted for more than allowed by law, though they were

accommodation makers, note was held void, 109 C 110

—they were principal debtors, not guarantors, 109 C 110

Small Loans Act; distinct statement of amount loaned as distinguished from amount of note required; "or value received" not enough, 115 C 102

table from which interest could be computed does not state interest in distinct terms required by Small Loans Act, 115 C 102

purpose of statement required of lender showing amount and date of loan and time of maturity, 120 C 152

—to inform borrower and comakers of time they will be called on to pay, 120 C 152

—and includes information not only of maturity in regular course but of occurrences which would make it payable at earlier date, 120 C 152

—so statement failing to recite that principal would become due if signers absconded, removed from jurisdiction, or disposed of property, did not comply with requirements, 120 C 152

—provisions of act must be strictly complied with, 120 C 152

failure on part of lender to comply with provisions of Small Loans Act renders loan unenforceable, 120 C 190

under amendment to act, acceptance by lender of chattel mortgage securing loan and provision in it for payment of attorney's fees, rendered note unenforceable, 120 C 190

—court should have allowed amendment setting this up as special defense, 120 C 190

requirements as to statement of maturity complied with, 124 C 346

—any potential error in sustaining demurrer to defense de interest payment exceeding 3 per cent a month, obviated by subsequent trial and determination of issue on merits, 124 C 346

—finding that such excess interest never charged or paid sustained, 124 C 347

—receipt for interest met requirements of statute, 124 C 346

—finding that previous note paid in full before note in suit executed, sustained, 124 C 347

—failure to strike from printed statement "This loan is secured by Personal Security-Comakers," through oversight, did not invalidate loan, 124 C 347

statement given by lender to borrower failed to comply with requirements and lender could not recover on note, 127 C 521

power given mortgagee to sell property, contained in mortgage of personal property accepted by license under New York Small Loans Act as security for loan, is not power of attorney within prohibition of act, 128 C 254

under provision of New York act that licensee shall deliver "borrower" a statement, statement given to one of two joint borrowers to whom is given the passbook is sufficient; the one receiving it becomes agent of other, 128 C 254

—burden of proof on defendants to show that required statement not given, 128 C 261

§ 5. —Miscellaneous; Older Legislation

note fairly made is not void for afterwards taking more than legal rate, 1 R 70

finding of jury as to corrupt agreement *held* conclusive, 1 R 111

that security may depreciate, *held* no excuse, 1 R 112

note obtained by extortion, fraud, or duress, is not within statute de usury, 1 R 115

no usury in mortgage here to pay interest lawful where debt secured was contracted, 1 R 295

no usury where sum more than just is included by mistake, 1 R 304

note for securities at more than market price, with option of return, *held* not usurious, 1 R 393

parol promise to pay illegal rate, as inducement to giving note, makes note usurious, 2 R 38

sum allowed in note for expenses in securing antecedent debt, whether bona fide and reasonable, *held* a question of fact, 2 D 483

none, where borrower was ignorant that an unlawful rate was reserved, 3 D 268

—to constitute usury there must be a corrupt agreement, 3 D 268

security substituted for principal of usurious security, and at legal rate, is not usurious, 3 D 356

loan; absolute deed as security; redemption on paying usurious interest, *held* not affected by a condition in favor of borrower within Statute of Frauds, 5 D 105

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—onus on party claiming it to be usurious, 2 C 175

to constitute, there must be a loan, 2 C 178, 17 C 452

—loan disguised as a sale may be usurious, 17 C 452

not avoided by mere substitution and change of notes, 2 C 276

compensation for obtaining loan and running notes, is not usury, 2 C 341

note of execution debtor to sheriff, as security, is not usurious when, 4 C 153

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§ 5 Usury

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agreement to pay interest on interest due is not usurious, 11 C 487
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—aliter, if usurious intent be proved as a fact, 14 C 594
none in note for compound interest accrued on other notes, 23 C 574
building association; monthly bonus in addition to interest, 24 C 147, 27 C 142, 282
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further loan only on giving security for prior loan; whether usurious depends on intent of parties, 27 C 432
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loan by agent, without authority or ratification, is not usury as to principal, 33 C 81
—but such authority may be presumed, when, 33 C 81
new note here at legal rate, for interest on note at 36 per cent, valid where made, is not usurious, 33 C 570
statutes construed; a note embracing interest at usurious rate, in principal named, *held* not an agreement in writing within act of 1872, 41 C 619
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demand note intended to run; contract to pay rate legal when made, is not usurious by a law reducing rate, before payment, 44 C 300
note at legal rate payable quarterly is not usurious, 44 C 493
broker’s custom to compute interest on monthly balances is not necessarily usury, 48 C 116
—such custom does not affect contract for purchase and sale of stocks, 48 C 116
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—merely demanding it or charging it on account book is not enough, 63 C 385
statute allowing only 6 per cent “for detention of money after it becomes payable” does not apply to note containing express provision for 12 per cent after maturity, 107 C 276
statute forbidding action on note providing interest in excess of 6 per cent a year confined to promissory notes in which no express provision is made as to rate of interest after maturity, 129 C 290
—does not extend to those in which rate otherwise lawful is prescribed as applying

both before and after time principal becomes due, 129 C 290

—so where instalment note provided for interest on unpaid balance at 3 per cent a month until principal sum with interest on unpaid balances was paid, 129 C 290

§ 6. Effect on Contract; When a Defense
plea of usury must set out principal and interest, K 143

change of rate of interest by payee to avoid usury, 1 R 94

—note being void at law, equity will enforce same against maker, 1 R 94

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usurious note is void in hands of indorsee whether negotiable or nonnegotiable, 5 D 130

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—so also by substitution of new contract on new consideration, 2 C 135, 280

—but is not avoided by mere substitution and change of notes, 2 C 280

—substituted security, by party to former security void for usury, is likewise void, 5 C 156

—substituted security by stranger, in consideration of payment of usurious security, *held* valid, 5 C 157

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evidence of usury in consideration of mortgage is admissible under general issue without notice, when, 4 C 437

borrower may waive benefit of statute, by payment, 5 C 154

parol evidence of usury admissible to avoid an absolute deed, 7 C 409

—only oppressed party can avoid contract on that ground, 7 C 409

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Vendor and Purchaser § 1

- forfeiture under, of whole interest after illegal contract was made, 24 C 446
- not of interest paid at legal rate prior to further illegal contract, 24 C 446
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- debtor may elect whether to use this defense, 32 C 552
- in Illinois defense of usury is personal to debtor and his privy; no usury in contract between payee and pledgee of note, and it cannot be made a defense by the maker, 91 C 553
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- usury between maker and payee ordinarily no defense to indorser sued on note, 99 C 683
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VACCINATION

See SCHOOLS AND SCHOOL DISTRICTS

VALIDATING ACTS

See STATUTES § 13

VALUE

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VARIANCE

See JUDGMENTS § 8; PLEADING § 34

VENDOR AND PURCHASER

- § 1. IN GENERAL
- 2. OPTIONS
- 3. FRAUD AND MISTAKE
- 4. SALES BY AGENT
- 5. CONSTRUCTION AND OPERATION OF CONTRACT
- 6. PERFORMANCE OR BREACH
- 7. RIGHTS AND REMEDIES OF VENDOR
- 8. RIGHTS AND REMEDIES OF PURCHASER
- 9. BONA FIDE PURCHASERS; NOTICE

NOTE: This title covers sales of real as distinguished from personal property.

See also BROKERS § 2; DEEDS; EASEMENTS; EVIDENCE § 62; LAND RECORDS; MORTGAGES § 11; SALES; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS § 5; TITLE AND OWNERSHIP

§ 1. In General

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§ 1 Vendor and Purchaser

- joint sale of land, in absence of proof, implies joint and equal interests, 20 C 73
- retention of land by grantor is not fraudulent, 31 C 428
- vendee's right to crops bought of husband and raised on wife's land; sale *held* valid under circumstances, 39 C 120
- agreement to convey land, at law, confers only right of action for breach; in equity, vests equitable title in vendee, 46 C 293
- title to land as subject of contract of sale, 79 C 321
- date of oral contract to sell land need not be proved as alleged, 87 C 90
- part payment on land creates equitable interest therein; subject to attachment, 90 C 555, 92 C 693
- right of vendee in possession under oral contract to buy is not subject to mechanic's lien, 91 C 165
- in a conveyance of land, a covenant to reconvey at some future date upon the happening of a contingency, violates Statute against Perpetuities, 93 C 518
- life tenant as vendor; absolute good faith required to obtain full value, 94 C 363
- vendor and vendee transposed in written agreement to sell; reformation allowed, 95 C 211
- bond for deed signed by one joint owner and administrator of other is joint contract, 95 C 400
- exchange of lands, defendant promising to pay an amount to be determined in future, or if no agreement could be reached, to arbitrate; *held* action could be maintained on contract though neither parties nor arbitrators could agree, 98 C 616
- vendee who takes possession of land to build thereon, though deed is not to pass until later, has equitable interest, 104 C 653
- mechanic's lien may attach to it, 104 C 653
- possession under contract of sale not adverse, 106 C 300
- will not become so until buyer does some act repudiating contract and owner knows of it, 106 C 300
- contract for sale of real estate, which fails to describe terms and conditions of mortgage to be assumed, is void for indefiniteness, 107 C 181
- estate of owner who has agreed to sell is converted in equity into personalty, 109 C 308
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- mechanic's lien may attach to purchaser's equitable interest, 110 C 392
- all circumstances to be considered in determining whether continued possession after change of ownership is under contract or a mere holding over; labor and expenditures on property, 112 C 427
- binding contract for sale of real estate confers equitable title; possession by husband and wife presumed to be that of the one having title, 112 C 427
- acts of husband in improving property sold by wife in which they continued in possession *held* to justify evidence of parol agreement by wife to repurchase, 112 C 427
- rights under attachment filed against vendee in possession under contract of sale; and under judgment lien created by it; effect on mortgage given when title passed, 114 C 79
- under what circumstances one furnishing labor or materials for building on land he has contracted to buy, may create mechanics' liens upon it, 115 C 357
- priorities where mortgages are given at time land is conveyed, 115 C 357
- effect of statute providing that if incumbrance is placed on land, liens originating before it shall take precedence over those originating after except that if any lienors of former class waive claim to precedence, then their liens are classed with those originating after it, 115 C 357
- finding disclosed no basis for counterclaim of promise by plaintiff to pay taxes due on property conveyed him by defendant and refusal to pay them, 116 C 710

§ 2. Options

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- option for land, deficiency on sale to be paid by defendant but to a limited amount; no liability until sale, 49 C 121
- option to purchase in lease *held* to relate back to date of lease, 67 C 50
- option to purchase, if vendor desires or elects to sell, of little value, 92 C 563
- in contracts to convey at the option of buyer or seller, time is of the essence of the contract, 92 C 563
- option to buy land must be exercised within reasonable time, if no time mentioned, 92 C 563
- if owner refuses to sell for nine years, he is presumed not to wish to sell, 92 C 563
- option to purchase leased premises; forfeiture by nonpayment of rent, 96 C 644
- option to purchase, under seal, but without consideration, is a mere revocable offer, 97 C 193
- such option will not survive death of person to whom given, 97 C 193
- true consideration may be shown by parol, 97 C 193
- time as of essence of option contract, 107 C 460

—rule does not apply to option in lease for its renewal, 107 C 460

option to purchase real estate and one for renewal of existing lease distinguished, 107 C 460

fact that one to whom gratuitous option to purchase property is given incurs expense in reliance upon it is not consideration, 116 C 535

corporation, authorizing broker to sell realty on certain terms, under no obligation to sell property to one of two to whom broker gave option, when other optioner refused to proceed, 125 C 572

§ 3. Fraud and Mistake

no recovery for fraud in sale of land if both parties have equally the means of knowledge, 2 R 94

equity will relieve for fraud in sale of land, when, 5 D 439

fraud in sale of lands is not excused by plaintiff's failure to search records, 25 C 313

retention of possession by grantor of land is no badge of fraud, 31 C 431

grantee to pay grantor's debts, grantor to remain in possession and grantee to make up grantor's support if land be insufficient; *held* not fraudulent in law; whether actually so is a question of fact, 31 C 432

one cannot take advantage of his own deception, either knowingly or ignorantly practiced upon another, 54 C 329

—conduct of defendant toward plaintiff who was incapable of reading *held* fraudulent, 54 C 329

fraudulent oral representations by vendor as to boundaries and dimensions admissible to show fraud, although acreage described as "more or less," 70 C 125

—mere naked representation as to value not actionable unless vendee fraudulently induced to refrain from inquiring as to its truth, 70 C 125

representations as to acreage of tract of land offered for sale made positively, as an assertion of an existing fact, actionable, 73 C 368

—not so, as to its value, 73 C 368

purchase price of land to be returned if title unsatisfactory requires honest dissatisfaction to justify return, 79 C 317

one fraudulently selling land under order of court for much less than market value liable for resulting damage, despite bond, 81 C 127

—action on bond cumulative remedy, 81 C 127

if failure to pay purchase price as agreed is due to vendor's own statements, he cannot take advantage of it, 82 C 383, 92 C 693

fraud if purchaser is an inexperienced person and a party with full knowledge of the value reports it falsely, 85 C 557

representation as to value of real estate is fraudulent if grossly false and part of scheme to defraud, 85 C 557

knowledge of defrauded party that a much smaller sum had been paid by seller does not prevent court from finding that representation of value was relied upon, 85 C 557

if broker does not know that his statement of lowest price owner would take is false, there is no basis of deceit, 86 C 63

where found purchaser relied on own judgment, broker's alleged deceptions never influenced plaintiff to purchase, 86 C 63

vendee, who has made a mistake as to his rights, is protected by equity; not necessary to show fraud, 87 C 293

representations of boundaries falsely given actionable even though boundaries are pointed out on the ground, 88 C 651

to make false representations actionable, purchaser must act on them, 88 C 720

notice by public record will not be imputed to person to whom statement is made, 94 C 219

—as where land records show true state of title misrepresented, 94 C 219

where charge is conspiracy to defraud, representations as to value of property are not disregarded as opinion, 95 C 79

vendor can have sale set aside where vendee entered into a conspiracy with A to convey him the land after former got it from vendor, 96 C 219

false representations de character of unseen first floor apartment, inducing purchase, 99 C 14

—statement not a matter of opinion, but assertion of a material fact, 99 C 15

—"exactly alike" construed as applied to first and second floor apartments, 99 C 15

failure to inform purchaser of land as to provisions in existing mortgages as fraud, 100 C 86

liability for reckless, though not intentionally false, statements, when made by seller of house concerning furnace, 101 C 73

defrauded purchaser may rescind sale of real estate if he acts promptly and does not by conduct indicate election to seek redress by action for damages, 102 C 137

whether party has waived right to rescind ordinarily question of fact, unless only one conclusion reasonable, 102 C 137

ignorance and stupidity as affecting waiver of right to rescind, 102 C 137

seller may repudiate upon purchaser's false representation that he is buying for himself; and even though contract assigned to

§ 3 Vendor and Purchaser

- third person who is party to the fraud, 103 C 708
- vendor under no duty to disclose facts ascertainable upon reasonable inquiry; such as charter right of water company to condemn farm, 104 C 650
- when it does arise, 104 C 652
- owner must do nothing actively to conceal facts or forestall inquiry, 104 C 652
- false statement as to rental value of real estate, 106 C 726
- persons may sell their property for less than its value and when parties do not stand in confidential relationship a court of equity will not, in absence of actual fraud, set aside sale for inadequacy of price alone, 119 C 541
- but inequality of bargain may be so great, the result so unconscionable, as to require but slight, if any, support from other inequitable features to justify setting sale aside, 119 C 541
- and when gross inadequacy of consideration is accompanied by misrepresentation, concealment, undue advantage taken of ignorance, equity will not hesitate to grant relief, 119 C 541
- where plaintiff bought property worth \$2500 for \$10 from inexperienced woman who was on relief, making to her gross misrepresentations of its value, court properly set aside conveyance, 119 C 541
- plaintiff granted no relief for improvements where he did not prove their value, 119 C 548

§ 4. Sales by Agent

See also BROKERS § 2

- declarations of agent of vendor are admissible in action against vendor, 88 C 547
- vendor bound with knowledge of terms of agreement drawn by his agent and read to parties, 97 C 352
- where wife signed agreement as “authorized agent” of husband but on distinct understanding that it was not to be effective unless approved by him, it is not enforceable in absence of such assent, 107 C 612
- husband and wife not partners, though she had largely handled his real estate, 107 C 613
- where defendant intrusted entire matter of purchase of premises to her brother, he had authority to assume mortgages in deed to her, 114 C 200
- if not she was chargeable with notice of assumption and by dealing with property ratified his act, 114 C 200

§ 5. Construction and Operation of Contract

- land sold to be returned, if unsatisfactory, must be returned in reasonable time, 73 C 480

- vendee sole judge, if he acts fairly; if use of article would destroy its value, this is an element in construction of contract, 79 C 317
- contract by administrator to sell land “after estate is advertised and deed can be given,” 80 C 227
- purchaser’s agreement to pay taxes construed, 84 C 177, 95 C 579
- seller agrees to make improvements; their cost is basis of damages, 85 C 212
- vendor’s agreement to sell and vendee’s to buy are mutual and dependent promises that each must be ready to fulfill, 91 C 332
- provision that if one did not pay \$100 he should forfeit all claim and moneys paid, *held* not to give option to perform, or lose what had been paid, 92 C 180
- written agreement as to apportionment of taxes supersedes all others on this matter, 95 C 579
- agreement to buy when buyer “could spare the money” with occupancy in interval is unconditional agreement to buy within a reasonable time, 101 C 219
- agreement construed to permit plaintiff to recover commission to broker despite transaction never going through, 101 C 504
- implied provision that possession be delivered within reasonable time, 102 C 556
- phrase in description “however otherwise bounded” does not permit exclusion of way recited as incumbrance on property, 103 C 285
- phrase ordinarily refers simply to possible mistake in names of adjoining owners, 103 C 285
- as does “now or late” or “now or formerly,” 103 C 285
- contract by vendee with H for purchase of land and a house “to be erected thereon” construed to be contract to purchase house and lot when house is built, 104 C 653
- goods furnished H were furnished to him as owner not as contractor, 104 C 654
- contract for exchange of properties *held* complete on its face and intended to embody entire agreement, 108 C 465
- provision that mortgages “to be arranged as well as possible” *held* not ambiguous, 108 C 465
- where grantee to secure loan agreed to repay grantors remaining in possession expenditures made if he disturbed their possession, assertion of claims to land and bringing groundless action of summary process was disturbance of possession, 109 C 522
- conclusion of court that sale was of actual quantity within designated boundaries and that statement of acreage was descriptive merely, *held* correct, 110 C 546
- agreement not stating assumption of mortgage on property or how payment will be made is agreement to buy for cash, 112 C 311

where no method of payment of purchase price of real estate is agreed upon it is presumed that payment is to be made in cash when title passes, 115 C 720

burden of loss for burning of building on land under contract of sale before time for performance, 120 C 390

—majority rule that loss falls on vendee, 120 C 392

—rule does not bear analysis, 120 C 392

—while vendee in equity is recognized as real owner, entire beneficial interest does not vest in him, such as right of enjoyment and profit, 120 C 393

—vendor not trustee of land for vendee; relation more like that of mortgagor and mortgagee, 120 C 393

—doctrine of equitable conversion not applicable; distinction from devolution of estates, 120 C 394

—to regard land as converted to personalty before time for performance is to do violence to expressed intent, 120 C 394

—distinctions between effect of contract for sale of land and of personalty do not afford basis for application of different rule as to risk of loss; such as recording, specific enforcement, 120 C 395

—that as vendee would have benefit of access of value so he should bear risk of loss, not sound reason for majority rule, 120 C 396

—intention of parties is that, when time for performance is reached, property bargained for shall pass, 120 C 390

—and condition of obligation to perform contract is implied that value shall continue to exist, 120 C 390

—*held* risk of loss is upon vendor, at least where possession has not passed, 120 C 390

—rule not always applicable: vendee only discharged of liability to perform when “substantial performance” by vendor has become impossible, 120 C 394

—this must depend on circumstances, intention of parties, use to which property is capable of being put, extent to which such use is interfered with, relative values of land and buildings, if wholly destroyed, or if only partially, value of what remains to whole, 120 C 390

—finding that burning of house had brought about substantial failure of consideration equivalent of finding that vendor no longer able substantially to perform, 120 C 394

—plaintiff vendee discharged of obligation to perform and entitled to recover sum paid as part of purchase price, 120 C 390

—dissenting opinion holds loss must fall on vendee since he has acquired full equitable estate and vendor has bare legal title, 120 C 402

finding that agreement was to sell only defeasible term which defendant owned, and not a leasehold to run for thirty-seven years, sustained, 123 C 137

—and conclusion that plaintiffs bought exact interest in land which defendant conveyed in quitclaim deed justified, though plaintiffs were evicted when defendant's lease terminated by breach of covenants, 123 C 137

§ 6. Performance or Breach

acts *held* to constitute breach of contract to purchase real estate, 7 C 291

failure of title as a defense to action on note for land, 11 C 432

a parol agreement as part consideration, restricting use of land, is not merged in deed, 61 C 482

—where grantee sold land with parol condition that no intoxicating liquors should be sold thereon, *held* injunction lies for breach, 61 C 482

obligee in bond for deed of land in fee need not accept conveyance of estate tail, 68 C 207

where administrator agrees to sell land and then learns facts which cause Probate Court to refuse to approve sale, no breach by administrator, 80 C 227

delivery of deed and payment regarded as simultaneous acts, 84 C 177

bond to give “good and sufficient deed” means good title, 88 C 60

one who has given a bond for a deed cannot make a good sale to another party without removing it from the records, 88 C 60

purchaser need not accept any conveyance short of one that gives full and complete title, 89 C 215

in sale of land, offer to perform after breach is of no significance, 90 C 2

in contract to buy and sell, the promises are mutual and dependent, 91 C 332

before one can recover for breach of contract as to payment, he is bound to offer and tender performance on his part, 91 C 332

—no delivery need be made if it is agreed that payment should be made first and it is not made, 91 C 332

bond for a deed gives vendee right to demand transfer of unincumbered title, 92 C 180

seller must be ready to convey unincumbered title at time set, even if purchaser does not appear, 92 C 180

if buyer gives time to remedy defective title, he is under no further obligation to tender performance, 94 C 589

vendor's contract to sell is to be performed within a reasonable time, 95 C 399

where one vendor of property held in common with an administrator, his agreement to sell “subject to order of the Probate Court”

§ 6 Vendor and Purchaser

- makes that order a condition precedent; the contract to sell is entire, 95 C 399
- contract to convey real estate; to be fulfilled in reasonable time, 97 C 252
- approval not necessarily by formal act, but might be inferred from conduct, 97 C 252
- where one agrees to convey farm of sixty acres and contract conveys one of forty-five acres, action for breach of contract lies, 97 C 345
- acceptance of deed stating acreage as forty-five does not obviate breach, 97 C 350
- vendor bound with knowledge of terms of agreement drawn by his agent and read to parties, 97 C 352
- agreement need not state time of performance as law will imply reasonable time, 98 C 316
- vendor cannot avail himself of delay due to his own failure to remove outstanding incumbrances where purchaser remains ready and willing, 98 C 316
- if amount of mortgages on property is substantially larger than stated in agreement and due dates are earlier, purchaser may refuse to proceed, 100 C 86
- may recover earnest money paid and incidental expenditures of preparing to take title, 100 C 86
- as between owner and prospective purchaser recitals in mortgage defeasance are prima facie evidence of amount of incumbrances and due dates, 100 C 86
- they are provable by certified copy of mortgage, 100 C 86
- burden on owner of property to show agreement states actual amount due, 100 C 92
- nonpayment is presumed, 100 C 92
- quaere as to any principle of caveat emptor, 100 C 86
- effect of failure of contract to mention fact that mortgages required mortgagor to pay taxes assessed upon holders of note, 100 C 86
- bearing of custom always to include such a provision in mortgages in that vicinity, 100 C 95
- seller was not bound to go to trouble and expense to get ready for transaction in view of buyer's repudiation, 101 C 504
- that there was a lease for one month of greenhouse on premises *held* immaterial where it appeared parties considered it too insignificant to mention and agreement provided for adjustment of rentals, 101 C 504
- proof of this agreement does not violate parol evidence rule, 101 C 504
- where D paid \$500 to an attorney as guardian and representative of the heirs on agreement that land, part of an estate, would be conveyed as soon as estate settled subject to a mortgage for balance, he had no further duty to perform until conveyance was tendered, 105 C 218
- neither he nor the representative of his estate was guilty of laches in failing to pay balance, 105 C 219
- neither buyer nor seller can recover for breach unless he tenders performance, gives notice tantamount to offer, or shows excuse, 105 C 657
- notice of willingness as equivalent to offer to perform, 105 C 657
- excuse for buyer's failure to tender performance; existence of restrictions on property; seller's duties, 105 C 657
- existence of substantial claim by third parties as justifying buyer's refusal to take title, 105 C 657
- seller is not in position to claim present ability to perform if removal of defect depends on consent of third party, 105 C 657
- purchaser not bound to "buy a lawsuit," 105 C 658
- where contract for sale of land provided for securing federal land mortgage to cover part of consideration and this proved impossible either party could terminate his contract, 106 C 485
- basis of recovery for substantial performance, 107 C 181
- or where defendant prevents performance or rescinds during performance, 107 C 181
- agreement to exchange lands, mortgages of certain amount to be left on one, "to be arranged as well as possible," construed, 108 C 465
- broken where deed tendered made land subject to mortgage in greater amount, 108 C 465
- where plaintiff had conveyed, judgment for \$5000 sustained by proof that equity in the property he was to get was worth that amount, 108 C 465
- deed subject to \$60,000 in mortgages not a compliance with contract for deed with \$55,000 in mortgages, 108 C 465
- seller tendered defective deed to buyer's agent and insisted upon leaving it, though agent refused to accept; retention by agent as enforced custodian of seller *held* not retention by buyer, 108 C 465
- agreement to make warranty deed with usual covenants means one which will convey title satisfying those covenants, 109 C 452
- to constitute breach, defect in title must be such that reasonable purchaser would not buy it at fair price or take mortgage, 109 C 452
- no defect where heirs and distributees conveyed without administration, and fifteen years having elapsed, possibility of claims against estate is remote, 109 C 453

—mere failure to take out administration will not ordinarily make title unmarketable, 109 C 453

rules that if parol evidence is necessary to establish title, purchaser cannot be compelled to complete contract, 109 C 457

—not invariable rule where agreement is merely to give marketable title, 109 C 457

—title by adverse possession sufficient, 109 C 457

to recover substantial damages for breach of land contract, loss in bargain must be shown, 113 C 535

under complaint for breach of contract to convey realty, plaintiff, himself guilty of breach, not entitled to recover, 113 C 774

right of way for sewer imposing on owner assessments of unknown amount not such unimportant incumbrance that seller can claim substantial performance, 115 C 452

by tender of deed seller waived right to claim that purchaser did not make legal tender of \$25 due on purchase price, 115 C 452

where seller of lot in large tract agreed to make improvements and no time fixed for doing so, whether reasonable time to make them had elapsed would be question of fact, 120 C 420

specific performance of bond for deed; finding that vendor orally canceled contract and released purchaser from performance sustained, 123 C 601

—also that vendor by reason of mortgage on property was unable to convey unincumbered title, 123 C 601

where there is an outstanding mortgage on premises and it did not appear that it could be removed at any time, vendor not in position to claim ability to perform, 123 C 601

where defendant denied signing agreement and alleged that if he did sign it his signature was procured by fraud, plaintiff relieved of obligation to make preparation for performance, 124 C 569

—sufficient if he was ready, willing and able, and not obliged to have balance of purchase price in cash, 124 C 569

§ 7. Rights and Remedies of Vendor

vendor's acceptance of belated payments operates as a waiver by him, 87 C 294

vendor is not bound to await expiration of contract if vendee has definitely repudiated it, 90 C 286

breach of agreement by vendee does not divest him of his interest but makes it possible for vendor to exercise his right of forfeiture; effect on attachment, 90 C 555

if vendor has waived instalment payments, he cannot demand them again, with notice that contract is rescinded, 92 C 693

—he must give reasonable notice that contract payments are required again, 92 C 693

an election to claim damages bars one from claiming a lien arising out of the contract, 95 C 66

anticipatory breach as excusing other party from preparation to perform, 101 C 504

—upon buyer's definite repudiation, seller not bound to perfect title, 101 C 504

—finding that seller ready, willing and able to perform was reasonable though title not perfected, 101 C 504

seller entitled to recover broker's fees upon buyer's repudiation, where contract obligated seller to pay them before passage of title, 101 C 504

until vendee disaffirms contract by filing complaint on basis of vendor preventing the securing of another mortgage, vendee's right to possession continued and vendor not entitled to possession under his counterclaim, 106 C 485

seller making alterations to house to suit buyer's wishes under unenforceable contract, may recover reasonable value, 107 C 181

right of rescission and restitution as alternative remedy to damages where aggrieved party has performed fully or in part, and wishes to recover what he has given or its value, 121 C 548

—such a right may exist when land has been conveyed and grantee fails to keep a promise made in consideration, though ordinarily specific performance or judgment for purchase price are adequate, 121 C 548

§ 8. Rights and Remedies of Purchaser

vendee has two remedies when vendor refuses to perform after part payment, 4 C 350

for material deficiency in land vendee may rescind, 45 C 507

where defendant agreed to buy certain land and deed same to plaintiff, but refused to give proper deed, *held* plaintiff could rescind, 54 C 326

—and recover amount paid defendant, 54 C 327

—plaintiff's possession of land for three months, *held* no bar to his recovery, 54 C 329

tender of purchase price is a condition precedent to the right to claim a good title, unless such tender is rendered useless by other party's absolute refusal to give a deed, 54 C 329

where through defendant's breach of contract the plaintiff lost an interest in land, the real value as between him and defend-

§ 8 Vendor and Purchaser

- ant, not the value of his legal title as it appears of record, governs, 85 C 636
- in action on bond for deed, time is of the essence; if obligor cannot give good title, purchaser may rescind and demand money back, 88 C 60
- if performance impossible, no demand or tender necessary before action, 88 C 64
- money paid under contract unenforceable by reason of Statute of Frauds not recoverable where complaint merely alleges breach of the agreement, 90 C 281
- even if specific performance is not granted, damages may be recovered, 90 C 281
- owner, unaware of leaking roof until after last payment, can recover for this defect, 91 C 657
- if vendor waives instalment payments and forthwith demands them again after a lapse, vendee can wait for vendor to withdraw his rescission or insist at once on contract provisions or tender in full balance of purchase price, 92 C 693
- vendor must make title good; otherwise vendee can elect to rescind sale and recover payments, 94 C 589
- an election to claim damages bars one from claiming a lien arising out of the contract, 95 C 66
- contract to sell real estate; seller cannot compel purchaser to take defective title but purchaser can compel seller to convey such title as he has, 96 C 553
- where mortgages larger than represented, purchaser may recover back money already paid, 100 C 86
- complaint construed to permit recovery on basis of rescission of contract rather than one for breach of contract, 100 C 86
- defendant purchased house in process of construction and took possession under seller's agreement to finish it; his refusal to do work and threat of repudiation justified defendant completing house at expense of owner, 101 C 324
- where defendant purchased land of plaintiff which was under heavy incumbrances, payment of much of price to be postponed to let plaintiff discharge some of them and agreement to suspend warranties three years, purchaser can credit on price amounts paid to discharge incumbrances and prevent foreclosure, 101 C 470
- not bound to wait three years and sue on warranty, 101 C 470
- agreement by purchaser with P, to whom seller had assigned rents to apply on mortgage on property he held, that P should retain rents due after sale of land as part payment of his mortgage does not concern seller, as rents belonged to purchaser, 101 C 470
- where owner of property refuses to proceed further with sale agreed upon, buyer is not bound to do any further acts under contract, 103 C 699
- right of vendee in possession to recover for repairs and improvements where it proved impossible to secure federal land mortgage as provided in contract and vendor prevented securing a substitute mortgage as orally agreed thereafter, 106 C 484
- failure to secure federal land mortgage as ground to abrogate contract, 106 C 485
- its continuance by oral agreement as justifying vendee's continued possession and preventing vendor's right to possession till contract disaffirmed by vendee's filing pleading, 106 C 485
- vendor then entitled to possession but judgment should be conditioned on payment to vendee for repairs and improvements, 106 C 484
- for breach of contract to convey real estate, measure of buyer's damages is difference between contract price and value of land, 107 C 207
- measure of damages for breach of contract to exchange real estate where plaintiff has performed and defendant has both properties, 108 C 465
- right to recover for expenditures, services or improvements made in reliance upon an unenforceable contract, 108 C 684
- to recover any deposit made on the purchase price, 108 C 683
- binding contract to sell realty gives purchaser equitable interest or title, 112 C 427
- on breach of contract to convey land, nominal damages follow, 113 C 535
- party entitled also to substantial damages if necessary facts proven, 113 C 535
- measure is loss in bargain, which is difference between contract price and market value of land, deducting purchase price if any has been paid, 113 C 535
- where under contract for exchange of lands they were found to be of equal value, verdict for substantial damage not proper, 113 C 535
- right to recover expense of preparing to carry out agreement, 113 C 535
- in action for breach of agreement to sell real estate, plaintiff who has broken contract not entitled to recover his part payments, 113 C 774
- vendee in possession under contract had interest subject to attachment, 114 C 79
- where vendor tendered deed not in compliance with contract, purchaser excused from tendering full performance as condition of recovery for breach, 115 C 452
- his right of action became complete when vendor tendered deed and it was apparent

he could not comply with the contract, 115 C 452
 where contract was for sale of entire tract of land free of incumbrances, fact that incumbrance affects only two lots on it does not relieve seller of liability, 115 C 452
 where effect of bond for deed was to furnish title free from incumbrances, fact that it did not specify warranty deed does not relieve seller, 115 C 452
 where house under contract of sale was destroyed by fire, contract discharged and purchaser entitled to recover back money paid in spite of forfeiture provision, 120 C 390
 quitclaim of leased property by lessor to mortgagee carried right to rent subsequently accruing until termination of lease by making new one, 120 C 568
 where seller on demand refused to perform or set time to perform, purchaser entitled to recover for breach of contract if he was willing, able and ready to perform; no tender necessary, 124 C 507

§ 9. Bona Fide Purchasers; Notice

See also LAND RECORDS

an equitable incumbrance binds vendee knowing the facts from which incumbrance is derived, 33 C 226
 —such vendee cannot take advantage of want of notice in tenant in common, 33 C 226
 purchaser of supposedly good title who supplies money to remove a mortgage is subrogated to mortgagee's interest, 81 C 547
 not indispensable for a purchaser to have a legal, as distinguished from an equitable, title in order to protect him against a lien of which he had no notice, 81 C 548
 purchaser of land with full knowledge that one claims to own personal property thereon is chargeable with knowledge, 82 C 681
 purchaser of land with knowledge of negotiations for sale to others can have same defense in action for specific performance as grantor, 83 C 120
 purchaser with notice of equitable rights of others stands as to these in grantor's shoes; case of where one saw poles on land but made no inquiries, 83 C 581
 purchaser, with full knowledge that land is to be sold to another, takes it subject to this equity, 87 C 91

purchaser with knowledge of recorded lien stands in shoes of grantor as to lienor's claims, 90 C 651
 one who buys property with actual or constructive notice of equitable claim takes subject to it, 104 C 285
 —so if he has notice of facts which, with reasonable diligence, would lead to knowledge of claim, 104 C 285
 —attachment of real estate in action affecting its title as notice of claims, 104 C 285
 —dissolution by bond and filing of certificate does not change rule, 104 C 285
 estoppel of third person who, in conversation with purchaser of real estate, makes no mention of claim and acquiesces in transfer, 104 C 285
 one who buys land with knowledge of previous contract to sell to another, takes title subject to latter's equities, 105 C 408
 purchaser of land takes subject to all equities of which he is put on inquiry from land records or otherwise, 107 C 657
 grantee who was informed of boundary between her lot and that adjoining and of map on file affecting it, bound with knowledge of its contents, 108 C 538
 —including way on which line ran and mutual gangway marked on it, 108 C 538
 one who purchases land with actual notice of unrecorded document affecting title, buys subject to it, 113 C 476
 —purchaser has such notice if he knows facts sufficient to put prudent man on inquiry which would lead to discovery, 113 C 476
 —one who purchases land on which is recorded lease referring to document not recorded, must be bound by terms of document if he had notice of it, 113 C 476
 one has notice where he knows facts sufficient to put prudent man upon inquiry of such a nature that inquiry, if prosecuted with reasonable diligence, would lead to discovery of claim, 120 C 75
 full and adequate means of knowledge ordinarily are equivalent of knowledge, 120 C 75
 if one buys land with notice of rights of third person, though land record title is clear, and purchaser believes no such rights exist, he may nevertheless be subject to them, 120 C 75

VENUE

See also JURISDICTION

foreigners cannot sue here on contract to be performed abroad, K 25

petition to open award may sometimes be brought in a county where neither party resides, K 241

Venue

- action *qui tam* of criminal nature may be brought in county where complainant lives, K 401
- action *held* maintainable here between foreigners, on a foreign contract, 2 R 66
- petition in chancery de title of land may be brought in county where land lies, though neither of parties reside within county, 2 R 456
- action of account against a cotenant need not be brought in county where land is, 1 D 263
- proper place to bring action in which United States is plaintiff, 4 C 343
- noxious odors arising outside jurisdiction but poisoning air of place within; whether within jurisdiction of latter place, *quaere*, 37 C 598
- suit for same to be brought where, 37 C 598
- under statute providing for removal of any civil cause which has been put to jury to same court in another county, case could be transferred after trial by jury and disagreement, 44 C 35
- record need not show reasons why case transferred, 44 C 35
- not necessary that issue should be joined to jury of county to which case goes, but sufficient if issue was once joined to jury generally, 44 C 35
- writ dated May 4, 1881, *held* returnable at Brooklyn, Windham County, in August, 1881, notwithstanding statute, 49 C 507
- under statute, District Court of Waterbury has jurisdiction in trespass over lands in Woodbury, where one of the parties resides in Woodbury, 51 C 170
- District Court of Waterbury has by statute jurisdiction in all cases in law and equity in which either party resides in certain neighboring towns in Litchfield County, including actions to recover possession of lands in such towns, 53 C 513
- courts of each State have exclusive jurisdiction over land within its own limits, 55 C 335
- action for trespass goes with person injured; the place is immaterial, 55 C 368
- under statute, exception *held* to mean “except when it is otherwise provided” by statute, not by any rule of common law, 62 C 127
- engineer prosecuted for injury to man in Litchfield County; man died in New Haven County; *held* Superior Court at New Haven had no jurisdiction, 62 C 127
- Superior Court in Litchfield County has jurisdiction over suit for damages from change of grade of highway, against municipalities in that county, 63 C 433
- District Court of Waterbury has no jurisdiction of action to quiet title to real estate which is not within judicial district, 72 C 698
- suit for construction of a will is brought in county where testator resided and will was probated, 81 C 36
- this is so though all parties were nonresidents and the testamentary appointment questioned was under a will probated in another State, 81 C 36
- certain civil actions within territorial jurisdiction of District Court of Waterbury may be brought to that court or Court of Common Pleas of Litchfield County, but not to Court of Common Pleas of New Haven County, 89 C 196
- county and district courts have exclusive jurisdiction of personal actions when both parties reside within them, and concurrent jurisdiction when either party resides therein, 96 C 282
- except that Court of Common Pleas for Litchfield County is also given concurrent jurisdiction where either or both parties reside in district of Waterbury, 96 C 282
- crime of uttering forged checks is prosecuted in county where accused indorsed the checks and passed them, not county where bank is located, 96 C 428
- change of venue properly denied where it must rest simply on statement of counsel as to publicity given case, 98 C 454
- motion for change of venue and separate trials in criminal case in discretion of court, 100 C 209
- to secure change of venue, accused must show that fair and impartial trial cannot be had, 103 C 454
- discretion of court, 103 C 454
- statute permitting transfer of appeals to another county passed and then repealed at same session; an appeal transferred while first act in force *held* not affected by second, 108 C 74
- transfer of case from Superior Court in one county to court in another effects change of venue, 108 C 74
- defect may be waived, by failure to raise point at trial, 108 C 74
- trial court has discretion to grant or deny change of venue, reviewable only in case of abuse, 109 C 571
- to be granted only with caution, 109 C 571
- motion for change of venue, because of newspaper articles, *held* properly denied, 109 C 571
- discretion of court to grant change of venue in criminal case, 110 C 55
- if there was defect in bringing case in Hartford County when accident occurred elsewhere, it was one of venue not jurisdiction, 117 C 683

- claim of want of venue waived if question not raised on trial, 117 C 684
- action by receiver of nonresident joint stock land bank joining as defendants stockholders residing in different counties, 121 C 220
- purpose of statute that actions in Superior Court be brought in county where plaintiff or defendant dwells, if either are residents, is to prevent harassment of defendants, 121 C 220
- in case of necessary joinder of parties, as where there are joint obligations, and one plaintiff or defendant resides in one county and the rest in another, statute construed so that action may be brought in either county, 121 C 220
- but contra where defendant is joined under broad provision of Practice Act as claiming “an interest in the controversy,” 121 C 220
- fact that prayer for decree that plaintiff has right to bring action was joined with demand for recovery from each defendant, nil sig., 121 C 220
- and since amount due from each stockholder was fixed amount, not dependent upon amount due creditors or amount recoverable from other stockholders, one stockholder is not necessary party in suit against another stockholder, 121 C 220
- and therefore no ground to violate purpose of statute by permitting joinder of defendant stockholders in single action where that would compel some to answer nonresident in county in which they do not reside, 121 C 220
- power to grant change of venue to be exercised with caution and rests in court’s sound discretion, 122 C 530

VERDICT

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NOTE: Particular cases in which the action of the trial court on a motion to set aside the verdict is reviewed are listed under the subject to which they relate, such as AUTOMOBILE, HIGHWAYS, LANDLORD AND TENANT, etc. The general rules of law controlling the action of the Supreme Court in reviewing the action of the trial court on such motions are included here (§ 16) and do not appear under the title APPEAL TO THE SUPREME COURT.

See also APPEAL TO THE SUPREME COURT § 29; CRIMINAL LAW AND
PROCEDURE § 15; JUDGMENTS §§ 22, 23; JURY AND JURORS;
QUESTIONS OF LAW AND FACT; PLEADING § 42

§ 1 Verdict

§ 1. In General

court cannot enter up verdict different from that returned, though contrary to direction in matter of law, 8 C 342

only final opinion of jury to be expressed by verdict, 16 C 346

court need not order the parties called before taking in the verdict of jury, 41 C 14

offer of accused to proceed with eleven jurors cannot ground a good verdict, without acceptance by State, 46 C 531

—quaere, as to verdict of eleven jurors in capital case where State accepted offer, 46 C 531

effect of verdict by mutual concession, 71 C 1

after trial court has accepted verdict Supreme Court cannot direct it to order a different one; a new trial is the remedy, 81 C 578

return of a verdict and its acceptance takes place of a memorandum of decision, 82 C 387

—time for notice of appeal runs from acceptance, 82 C 387

judge's supervision of a verdict is an essential part of our jury system; involves exercise of judicial discretion, 86 C 223

must be based on injury happening on some particular date in evidence though it may not be date alleged, 90 C 262

must be for defendant if it is disproved that accident happened on date alleged, unless some other date proved, 90 C 262

fact that jury reached a verdict after receiving special instructions as to their duty to agree does not indicate that they misunderstood the instruction, 90 C 381

cannot tell with certainty how a verdict is made up, 90 C 625

in absence of motion to set aside, verdict is presumed to be based on sufficient evidence, 91 C 266

return of verdict and its acceptance by court constitutes determination of a cause, 91 C 383

verdict for money damages does not as a matter of law carry interest, 91 C 581

verdict settles question of existence or non-existence of material facts in issue, 92 C 226

degree of murder is determined by verdict of jury, 93 C 242

impropriety of a compromise verdict, 94 C 509

finding of value in a verdict not received by the court cannot be used by the court for any purpose, 95 C 248

anomaly of verdict against master because of negligence of servant and in favor of servant in same action, explained by fact that plaintiff asked no verdict against serv-

ant if master found liable, 95 C 733 footnote

facts alleged anywhere in the pleading and proved by any evidence are basis for verdict, 96 C 395

oral discussion between judge and jury as to what is covered by the verdict is objectionable, 97 C 182

where a corporation and an individual are sued jointly for conversion of property, individual is entitled to verdict if no case is proved against him, 99 C 523

apportionment of verdict against third party between employer and employee under Compensation Act, 104 C 504

omission of jury to include interest in plaintiff's verdict gives defendant no cause for complaint, 104 C 703

upon basis of alternative liability of K and B, verdict against K on ground that G was acting as his agent would justify if not require verdict for B, 117 C 170

verdict against H, driver of car in which plaintiffs were riding, and in favor of W, with whose car it collided; *held* no reason to prolong litigation against W, and H's appeal from entire verdict dismissed as to W, 118 C 632

§ 2. Rendition; Form

must find the issue as to each of several defendants in trespass, K 424

must answer all material facts in issue, 2 R 254, 1 D 189

sufficient certainty in ejectment for two parcels of land, 2 D 68

where whole question in case is settled by verdict, it will not be set aside unless omission to find other issues is prejudicial, 14 C 271

omission of verdict to answer immaterial pleas does not render judgment erroneous, 14 C 271

that "minority wish to remain silent" is no ground of arrest, if all concur in verdict, 16 C 346

what is the only proper mode of assent to verdict, 16 C 358

should be rendered in open court by whole jury, 18 C 81

informal mode of rendering verdict *held* sufficient when, 18 C 81

action of fraud; defendant acquitted and plaintiff awarded damages and costs; insufficient as verdict for either party, 28 C 140

inconsistency and repugnancy in verdict show merely a mistrial, 30 C 519

verdict for plaintiff in ejectment, and that defendant have time to remove barn, *held* vitiated by last clause, 42 C 267

verdict not complete until read to jury and assented to by them, 46 C 230

—that read to jury and assented to is the real verdict, though differing from the written verdict returned, 46 C 230

invalid if apportioning damages between co-defendants; such apportionment not to be regarded as surplusage, 48 C 520

parties are entitled to a verdict on each of several separate counts, 53 C 280

significance of acceptance and recording, 64 C 71, 75 C 676, 82 C 387, 91 C 383

reading aloud on receipt; procedure as to verdict, 71 C 551

judge may return verdict not in proper form without announcing it, 72 C 141

where two forms of verdict were given jury, captions indicating that one was against one defendant and other was against both, and judge explained this to jury, no objection being made, such objection comes too late on appeal, 81 C 280

form of verdict against one or both defendants should state whether recovery is to be had of the defendants or of the defendant John Doe only, 81 C 280

verdict assented to by jury but not in writing or signed, good, 81 C 656

no verdict until conclusion reached by jury is accepted by court, 89 C 238

until each juror has given his assent to verdict announced by foreman, any previous assent may be recalled or mistake of foreman corrected, 90 C 381

assent to verdict by juror may be by physical sign; bowing of head, 90 C 381

no particular form required for verdict; “after careful consideration of the evidence, we find judgment for the plaintiff,” upheld, 91 C 668

verdict, in case where three were charged with conspiracy, against A et als., includes all three, 95 C 79

if real and personal property is transferred in one transaction there is no reason for making distinction in verdict, 97 C 714

in replevin with counterclaim, taking two verdicts improper but mere informality not vitiating result, 100 C 97

—if verdict can be understood it will be sustained, 100 C 100

error in caption does not invalidate verdict otherwise intelligible, 100 C 393

verdict in action with counterclaim finding issues for plaintiff on complaint and for defendant on counterclaim and “for the defendant to recover \$315.58 damages” upheld, 100 C 397

verdict for defendant on complaint and for plaintiff on cross-complaint consistent, 100 C 579

suggested forms of verdict where more than one defense is pleaded, 110 C 108

verdict simply finding for defendant where counterclaim has been pleaded is defective, 115 C 704

—motion for arrest of judgment lies, 115 C 704

notation on form of verdict, after amount of damages, “Equally responsible. Each defendant,” without significance as affecting verdict, 124 C 83

§ 3. Returning Jury for Reconsideration; Refusal to Accept

should not be received in criminal case if prisoner is absent on bail, 1 R 90

in action for statute penalty, court may return jury to a second and third consideration, 1 R 493

judge may return verdict not in proper form without announcing it, 72 C 141

power to send jury back to reconsider verdict, 74 C 582, 82 C 615, 89 C 238, 90 C 93, 262

jury can be returned to further consider question of interest, 82 C 615

jury can be sent back even if only error is bringing in too great damages, 89 C 238

court must accept verdict after a third consideration, 89 C 241

jury can be sent back to reconsider damages if palpably inadequate, 90 C 93

under statute court has wide discretion in sending jury back, 90 C 262

where jury considered cases without result, fact verdict returned after appropriate instructions relative to duty to reach verdict does not invalidate it, 90 C 381

jury bringing in verdict of first degree murder may be returned for further consideration, if judge is himself in doubt of degree proven, 93 C 242

finding of value in a verdict not received by the court cannot be used by the court for any purpose, 95 C 248

verdict not responsive to issues raised or presented to jury need not be received, 95 C 389

if jury finds a verdict, but will not answer interrogatories submitted, it should not be accepted, 95 C 487

court may return jury twice even in murder case, 98 C 455

—so if it thinks verdict inadequate, 98 C 508

right is discretionary, reviewable only in case of abuse, 99 C 415

—court may give reasons, 99 C 415

—exercise not reviewable if final verdict accords with law and evidence, 99 C 415

—reasons given are part of charge, 99 C 415

where jury finds against one defendant only and verdict fails to run in favor of an-

§ 3 Verdict

other, jury may be returned to correct it, 99 C 523

where jury sent back for second or third consideration, clerk should be allowed to read verdict orally; but refusal to permit it is not reversible error, 105 C 528

in support of a motion in arrest of judgment, jurors may not testify how they reached the verdict which the trial court required them to reconsider, 105 C 528

verdict should not be accepted when so incomplete that it will not support a judgment, 105 C 774

authority of court to return jury for second and third consideration of case, 106 C 728

returning jury for further consideration of verdict not reviewable unless it involves abuse of discretion, 108 C 549

court exercised wise discretion in returning case to jury for reconsideration of amount, 111 C 730

statute authorizing court to return jury for further consideration applies in criminal cases, 113 C 247

—should be returned if verdict ambiguous, 113 C 256

—history of statute, 113 C 256

where fatal variance existed, trial court properly directed jury to reconsider verdict for plaintiff and instructed them that plaintiff was limited to negligence alleged, 114 C 195

where court asks reconsideration, it is proper to return verdict to jury, but another blank should be given them, 114 C 396

court may refuse to accept a verdict though if the jury persists in it after twice reconsidering, it would be obliged to do so, 114 C 396

—instruction that if they bring in one for plaintiff it should be for adequate damages, upheld, 114 C 396

extent to which trial court should instruct jury as to its right to persist in verdict after reconsideration; where there may be reasonable difference of opinion; where verdict is unreasonable, 116 C 48

if jury is returned to reconsider verdict, it is proper for court to inform them why they are so returned, 117 C 428

—in absence of erroneous instruction, action will not be reviewed by this court, 117 C 428

—nothing erroneous in court's remark that, in its opinion, if plaintiff was entitled to recover \$2500 was inadequate, 117 C 428

under statute, exercise of this power not conditioned on verdict being so unreasonable that it would have to be set aside, 117 C 428

charge in *State v. Smith*, 49 C 376, approved as proper instruction where jury has failed

to agree within reasonable time upon verdict, 118 C 501

until verdict accepted by court, it is not a verdict at all, 120 C 537

—after it is announced and before accepted, court may refuse to accept it and return jury for second or even third consideration of case, 120 C 537

—if court is silent when foreman announces verdict, clerk may treat silence as authority to proceed to last inquiry to jury, and acquiescence by court is tacit assent to that step, an acceptance of verdict, and an order that it be recorded, 120 C 537

—procedure in instant case, according to practice commonly followed imported that verdict was accepted by court, 120 C 537

court could properly refuse to accept verdict and send jury back for further consideration where it deemed verdict for plaintiff inadequate; in so doing it could properly assume first verdict settled issue of liability in plaintiff's favor, 128 C 56

resubmission correct in will contest after jury had considered it four hours without reporting, 128 C 376

§ 4. General Verdict; Effect

§ 5. —In General

general verdict supported if any count contain a good cause of action, 1 R 346, 433, 2 C 324, 9 C 215, 15 C 533, 23 C 585, 29 C 464, 39 C 523

—also when evidence is limited to one count, 5 D 175

—and where evidence is applicable to all the counts, 17 C 259

—and where it follows the issue, 18 C 86

general verdict set aside as to part only, where general and special issues are answered, 1 R 353

general verdict presumed to be for breaches not specially pleaded to, 1 D 30

new trial not granted if verdict be general and sustainable on any sufficient count, 25 C 374

general verdict will ordinarily suffice to fix and ascertain particular rights in issue, 53 C 236

accused cannot complain of a general verdict when he failed to request a separate one on each count, 54 C 88

failure to request special verdict waives objection to general verdict on several counts, 76 C 680

special interrogatories allowable only to test correctness and extent of general verdict, 83 C 110

interrogatories not covering all the issues and there being no general verdict, a decree is erroneous which can be justified only if some other issue is found, 83 C 110

general form of verdict does not indicate that jury neglected to pass on all claims, 86 C 319

a general verdict for plaintiff raises presumption that all issues are found in his favor, 93 C 247, 94 C 690, 95 C 724

general verdict on several counts stands if one of them justifies it, 94 C 168

general verdict stands though error in the charge as to some of the issues, 94 C 690, 95 C 724

defendant can protect himself by asking for a separate verdict on each count, 94 C 690

general verdict imports finding all issues for prevailing party; if no error on one count verdict stands though there may be on other counts; protection by special verdict on each count or interrogatories, 98 C 52, 305, 100 C 194, 314, 493, 104 C 24, 105 C 573, 107 C 242

effect of general verdict where error occurs during trial, 98 C 52

general verdict must stand, if any one of the counts is supported by credible testimony, 98 C 653

—even though verdict, if based on a particular count, would be erroneous, 98 C 653

—defendant may protect himself from possible injustice by asking separate verdict on each count, 98 C 653

interrogatories as protection against rule that general verdict imports finding of all issues for prevailing party, 100 C 194, 104 C 23

separate verdicts on separate counts should be required of jury when requested and where necessary to protect rights, 104 C 520

general verdict on two counts is good if justified on one count, though error committed in charge on other count, 105 C 483

general verdict as importing that all issues are found for party, where defendant depends on denial of liability and estoppel, 105 C 641

conclusive effect of general verdict where there are two or more causes of action may be avoided by submission of proper interrogatory, 106 C 153

submission of interrogatories in discretion of court unless they are necessary to protect party from implications of general verdict, 107 C 242

verdict may render harmless charge upon subjects which have no place in case, 108 C 126

rule that where more than one ground of recovery stated general verdict will stand if supported as to any, re-examined and limited, 110 C 109

—applies only where two distinct causes of action are asserted, 110 C 108

—not where different facts are alleged to support one cause of action, 110 C 116

—applies where recovery is sought for negligence and wanton misconduct, 110 C 108
implication of general verdict in action for fraudulent representations not properly applicable, 110 C 116

in criminal case will not cure defect in information which is fatally defective, 111 C 209

—as where it alleges offenses in the alternative, 111 C 209

general verdict reached without error as to one basis of liability not invalidated by error as to another, 111 C 521

—as liability of street railway company for negligence in operation of car and for defect in street it was its duty to repair, 111 C 521

general verdict where several grounds of negligence charged does not prevent taking advantage of error as to any one, 112 C 476

verdict for plaintiff on conflicting evidence necessarily imports that jury found facts as claimed by her, 116 C 213

rule that where there are two or more counts and general verdict is rendered it will be sustained if there was no error as to one of them, applies only where damages recoverable on different counts would be the same, 117 C 207

—does not apply where one count was alienation of affections and the other adultery, measure of damages being different, 117 C 207

where complaint states two causes of action and there is general verdict and no error is found as to first, error as to second not ground for new trial, 119 C 403

formerly where complaint stated two grounds of recovery, and there was general verdict with no interrogatories, if verdict could be sustained on either ground it was good, 120 C 415

—but rule now limited in cases where various grounds of negligence alleged; appellant may take advantage of errors on one specification only, 120 C 415

general verdict, if good on either count, must stand, 121 C 201

where in equitable proceeding trial by jury is had general verdict usually will not serve purpose intended, which is to inform court as to facts upon which relief, if any, is to be granted, 121 C 646

—proper course is to submit interrogatories covering only those issues upon which court determines, in its discretion, decision of jury is appropriate and useful, 121 C 646

—if answers are returned and accepted, court determines any other issues neces-

§ 5 Verdict

- sary to decision of case and gives judgment, 121 C 646
- where there was general verdict, error in charge as to one count only was harmless where no error as to cause under second count, 122 C 500
- general verdict should stand if it can be supported on any ground, 124 C 469
- where verdict for defendant is general, presumption is that jury found all the issues for him, 125 C 77
- where there are two or more causes of action, no interrogatories, and general verdict, error as to one cause will not be ground for reversal, 126 C 162
- as regards defense, rule not applied where grounds are admissible under mere denials; but should be applied between such matters and matters which are or should be specially pleaded, or where two or more defenses of latter class, 126 C 162
- when two causes of action are stated in complaint without division into counts, if defendant wishes to protect itself against effect of general verdict, it should submit interrogatories, 126 C 197
- if party wishes to protect himself against effect of general verdict he should submit interrogatories, 129 C 405
- ### § 6. —Particular Cases
- count for two nuisances and count for one alone; verdict may be general, 28 C 321
- where complaint charges murder in three counts differing only as to means, general verdict is sufficient, 74 C 525
- effect of general verdict for plaintiff on complaint in two counts after judge has instructed jury to find for defendant on one, 80 C 209
- general verdict of guilty finds as true allegation of value as well as other allegations in charge of theft; especially if jury could not find less value and no special verdict requested, 83 C 287
- verdict for plaintiff in action of servant against master constitutes a finding that master was negligent, 84 C 269
- verdict for plaintiff imports a finding by jury that contract set up in complaint exists, 93 C 412
- general verdict of guilty when one was charged with assault in two counts upheld, if penalty was appropriate to conviction on either, 95 C 140
- if complaint alleges drivers of both cars were negligent, general verdict finds this true though special negligence is alleged against one, 95 C 732
- where under pleadings and charge jury were obliged to award plaintiff some damages if they found certain contract, verdict for defendant imports finding that contract not made, 101 C 59
- where one of issues was whether guaranty was for a single bill of goods or was a continuing one, general verdict for plaintiff concludes it in his favor, 104 C 407
- general verdict in negligence action for defendant disproved negligence and any error in failure to submit issue of defendant's liability as agent rather than as independent contractor immaterial, 106 C 153
- general verdict in negligence case imports finding of negligence in one or more of ways specified, 108 C 505
- general verdict for defendant where there were two issues, one of agency and one of negligence, imports finding of both for him, 109 C 460
- where both negligence and wanton misconduct are alleged and there is a general verdict, error as to one will not avail appellant if there is none as to other, 116 C 48
- where no error in charge de negligence and verdict was general, any error in charge dealing with cause based on reckless misconduct would not result in new trial, 116 C 471
- verdict in favor of defendants, employer and driver, implies that jury found no actionable negligence on part of driver or found plaintiff guilty of contributory negligence, 117 C 699
- and as employer would only be liable if case were established against driver, erroneous rulings on issue of employment not of consequence, 117 C 700
- same as to rulings on issue of damages, 117 C 700
- verdict against plaintiff, infant passenger in car, imported defendant not negligent, and erroneous charge de contributory negligence of plaintiff driver not harmful, 118 C 154
- where tenant based action on retention of control of premises by landlord and on failure to keep agreement to repair, verdict could be sustained if there was no error as to one cause of action, 119 C 403
- where case was submitted on two grounds, negligence and wanton misconduct, and interrogatories showed jury found for plaintiff on both and that he was not contributorily negligent, errors assigned with reference to wanton misconduct will not be considered, 120 C 445
- where defendant's verdict was general and issues were reckless disregard and agency, verdict might have been based on former and errors in charge to agency not reversible, 121 C 316
- where plaintiff claimed lack of testamentary capacity and undue influence and general verdict could be sustained on first ground,

denial of motion to set it aside correct, 124 C 468

where only possible basis of liability was assault by agents, either employee or police supernumeraries paid by defendant, general verdict for plaintiff did not obviate error in charge de liability for acts by latter as its agents, 125 C 705

in suit for real estate broker's commission, claim of principal that offer withdrawn should have been specially pleaded, and error in charge as to it not reversible where there was also issue as to whether offer made, 126 C 162

where pedestrian recovered for injury due to being struck by automobile and evidence whether she had reached shoulder of road was conflicting it must be assumed that she did, 126 C 345

where plaintiff claimed by virtue of negligence and nuisance, general verdict for defendant did not cure error in charge on issue of nuisance, 126 C 446

where general verdict against hospital may have been based on ground as to which no error in charge was committed, the negligent employment of incompetent servants, it must stand though court erred in charge which would have affected other ground, alleged breach of contract through negligence of employees, 127 C 194

§ 7. Interrogatories; Special Verdict

court should direct separate verdicts on separate counts if requested by either party, 53 C 236

—and where counts embrace distinct and independent causes of action, 53 C 236

special verdict in general, 75 C 220

interrogatories so framed as to call for response only if verdict is for plaintiff need not be answered if verdict is for defendant, 81 C 601

if plaintiff wishes interrogatories answered, whether his own or defendant's, irrespective of the result of the trial, he should say so before verdict; cannot remain quiet if unanswered until jury discharged, 81 C 601

purpose of special verdict is to furnish basis of judgment rendered, 81 C 601

in absence of recorded objection, appellant presumed to assent to submission of interrogatories, 81 C 601

purpose of interrogatories is to elicit facts to test correctness of verdict and ascertain its extent, 81 C 601, 83 C 110

court has power to submit written interrogatories to be answered on return of a general verdict; when and how done is within discretion of the court, 81 C 601

rule as to character of interrogatories, 81 C 601

common practice to direct jury to state on which of several counts verdict is given, 81 C 613

a request that the jury be instructed to state in their verdict the particular facts on which it rests and what work and materials are found to be extra is not proper, 82 C 485

in action for trespass, can require jury to answer interrogatories relative to the ownership of the land, 82 C 595

special interrogatories allowable only to test correctness and extent of general verdict, 83 C 110

interrogatories not covering all the issues and there being no general verdict, a decree is erroneous which can be justified only if some other issue is found, 83 C 110

refusal to submit written interrogatories prepared by one of the parties *held* not to be an improper exercise of judicial discretion, 83 C 183

where there are several distinct grounds on which a verdict can be based, court can submit interrogatories, 85 C 459

written interrogatories and their answers should be filed and recorded with the verdict as a part thereof, 88 C 558, 97 C 189

interrogatories are within court's discretion; proper where equitable relief is asked, 90 C 624

special verdict or interrogatories proper where complaint states cause of action at common law and under statute permitting doubling of damages, 93 C 247

defect or irregularity in form of interrogatories is immaterial if they are consistent with a general verdict and no actual harm appears, 93 C 446

inconsistencies in answers to interrogatories to be construed by context, 94 C 168

—answer limited to certain counts though general in terms, 94 C 168

if more than one basis of recovery stated in one count, interrogatories are proper, 94 C 690

if there is more than one count, may ask for separate verdict on each, 94 C 697, 97 C 188

improper to send jury back to consider interrogatories unanswered, after a general verdict is accepted, 95 C 486

purpose of interrogatories, 95 C 487

jury should be required to answer interrogatories before acceptance of verdict, 95 C 487

when interrogatories are proper in general; discretion of the court, 95 C 499, 96 C 2, 97 C 182

—withdrawal by court after submission to jury, 95 C 499

—procedure on return of jury, 95 C 499

—should be answered directly, 96 C 2

§ 7 Verdict

improper orally to interrogate jury as to basis of verdict, 97 C 182

answers to interrogatories to be read so as to make them consistent if possible, 97 C 337

if verdict is irreconcilable with answers to interrogatories it cannot stand, 97 C 419

defendant may protect his interests by use of interrogatories where several issues are presented in one count, 98 C 51, 305

answer to interrogatories conclusive on refusal to grant a motion non obstante veredicto, 98 C 217

interrogatory should not involve immaterial issues, 98 C 218

should be addressed to some issue raised by the pleadings and one which may be of material weight, 98 C 218

proper where case seeking equitable relief goes to jury, 98 C 222

form of interrogatories submitted to jury *held* inadequate, and answers decisive of equitable issues also, 98 C 222

defendant may ask for separate verdict on each count, in order to ascertain upon which count verdict is based, 98 C 653

special interrogatory must be so phrased that answer will be conclusive of some important issue, 99 C 40

—discretion of court to refuse submission, 99 C 54

refusal to submit interrogatories after completion of charge, and after luncheon had intervened, *held* proper, 99 C 447

—submission then likely to have confused jury, 99 C 447

as protection against rule that general verdict imports finding of all issues for prevailing party, 100 C 194, 104 C 23

right of jury to separate one interrogatory from another similar one, giving affirmative answer to one and negative one to other, 100 C 448

parties have a right to have interrogatories submitted where two causes of action are stated, either in separate counts or in one, 100 C 490

—if not in proper form, court has discretion as to submitting them; proper form of interrogatory, 100 C 490

—series of alleged false representations inducing contract, 100 C 494

where facts surrounding making of contract which determine its construction are in dispute, court may call for special verdict as to them and then construe contract, 100 C 581

where question was whether guaranty was for a single item or was a continuing one, special interrogatory would have been proper if it was desired to raise question later, 104 C 407

interrogatories to determine disputed facts relating to interpretation of contract, 104 C 645

should state but one distinct point for jury's answer, 105 C 443

discretion of judge as to submitting interrogatory, 105 C 572

—should do so if requested where two or more counts or two or more separate causes of action are stated, 105 C 572

—proper form, 105 C 572

—if not properly drafted submission is matter of discretion, 105 C 572

—interrogatory seeking merely disclosure of method of calculation by which amount of verdict was reached *held* improper, 105 C 572

conclusive effect of general verdict where there are two or more causes of action may be avoided by submission of proper interrogatory, 106 C 153

submission of interrogatories in discretion of court unless they are necessary to protect party from implications of general verdict, 107 C 242

discretion of court to submit interrogatories pertinent to controlling issues, 108 C 623

interrogatories as protection against implications of general verdict where only one count, 110 C 108

what they should contain; negligence actions; distinct causes of action on same facts and on different facts, 110 C 108

where defective interrogatory can be cured by slight change, trial court should ordinarily assist in correcting it, not simply refuse it, 110 C 108

should present complete cause of action; should state only single and distinct point, 112 C 476

defendant in suit alleging various grounds of negligence may take advantage of error as to one ground only; interrogatories unnecessary, 112 C 476

in negligence action submission of interrogatory based upon right to recover upon one of grounds alleged now rests in discretion of court, 112 C 481

interrogatory as to whether injury was caused by defective fuse or because of dangerous instrumentality properly denied, where case depended on one ground of action only, 114 C 56

answers to interrogatories, as well as verdict on issues, appropriate to aid court in rendering judgment in case involving equitable demands, 117 C 289

when case presents single ground of action, refusal to submit interrogatories is matter of discretion, 117 C 611

practice of submitting interrogatories in connection with general verdict, proper incident of jury trials, 119 C 630

—purpose is to limit or sustain general verdict, to ascertain on what grounds it rests, to afford means of testing it and to aid in proceedings for subsequent review, 119 C 630

—thus they may show on which of several counts jury based verdict, 119 C 630

procedure of entering judgment based upon answers to interrogatories under proper circumstances in favor of party against whom general verdict has been rendered, 119 C 630

—in most States controlled by statute, but practice has been recognized at common law, 119 C 630

—where it is recognized, answers must be such in themselves as conclusively to show that as matter of law judgment could only be rendered for party against whom general verdict was found, 119 C 630

—particularly would this be so under our practice because evidence would not be before Supreme Court on review of such judgment, 119 C 630

—where automobile struck by train at night, fact that man was on crossing swinging lantern, brought out by interrogatory, not sufficient to justify entering judgment for defendant, 119 C 630

proper course in equitable proceedings is to submit interrogatories covering only those issues upon which court determines, in its discretion, decision of jury is appropriate and useful, 121 C 646

—if answers are returned and accepted, court determines any other issues necessary to decision of case and gives judgment, 121 C 646

judgment does not follow jury's answers to interrogatories where issues are equitable, but judicial action is required, 121 C 650

in equitable action tried to jury it is peculiarly within discretion of court to submit such interrogatories as it deems will be helpful in making of ultimate decision, 122 C 561

interrogatories should include controlling facts for determination of ultimate decision, 122 C 565

waiver of right to object to; plaintiff not prejudiced by submission, 123 C 662

if party feels interrogatories are not broad enough to cover issues, he should object before interrogatories are submitted, 124 C 569

where negligence, gross negligence and wanton misconduct alleged in one count, defendant entitled to interrogatories as to whether proximate cause was first or last; gross negligence disregarded, 125 C 151

when two causes of action are stated in complaint without division into counts, if defendant wishes to protect itself against ef-

fect of general verdict, it should submit interrogatories, 126 C 197

where complaint alleged negligence and wanton misconduct but former only was relied upon at trial, no occasion to submit interrogatory as to latter, 126 C 483

in action for reformation of policy and damages if whole case be tried to jury, equitable issues should be submitted to them on interrogatories, upon answers to which court can base judgment on reformation, 126 C 570

when two causes of action are stated in complaint without division into counts, if defendant wishes to protect itself against effect of general verdict, it should submit interrogatories, 127 C 197

where case presented single ground of action, refusal to submit interrogatories was matter resting in court's discretion, 128 C 527

if party wishes to protect himself against effect of general verdict he should submit interrogatories, 129 C 405

court has wide discretion as to submitting interrogatories de subordinate facts, 129 C 688

error rarely found in failure to submit interrogatory when not requested, 129 C 688

§ 8. Directing Verdict

§ 9. —In General

duty of judge to direct verdict for plaintiff when, 5 C 406

where jury refuses to return verdict as directed, court must record verdict given by jury, 8 C 342

it may be error not to do so, where facts are undisputed, 66 C 241, 77 C 141, 79 C 569, 80 C 300

—in criminal prosecutions, 65 C 287, 69 C 133

to direct verdict for one party where verdict for other would be legally sustainable is error, 69 C 503, 80 C 237, 300

where facts are undisputed and question is purely one of law, refusal to direct verdict is error, 77 C 137

judge need not explain reasons for directing; judgment directing not readily reversed, 78 C 127

where verdict depends on law alone, judge should direct, 79 C 406

verdicts are directed upon principle that where only one conclusion is reasonably possible, questions of fact need not be submitted to jury, 81 C 343, 82 C 394, 84 C 1, 86 C 131, 439, 88 C 16, 90 C 30, 139, 91 C 430, 92 C 560, 95 C 48, 441

verdicts should be directed only when opposite verdict would be set aside on motion, 81 C 383

§ 9 Verdict

- where plaintiff fails to establish logical basis for inference that negligence was proximate cause of injury, 81 C 395
- power to direct verdict is part of the jury system; jury still finds the issue, 81 C 578, 86 C 223
- appellate court cannot order verdict directed in trial court, 81 C 578
- new trial to be granted where verdict is directed if record shows evidence sufficient to prove every fact essential to appellant's case, 81 C 615
- if case is returned by Supreme Court because plaintiff failed to prove due care, and the additional evidence only weakened case, verdict can be directed for defendant or set aside if for plaintiff, 82 C 471
- desirable though discretionary to have a jury retire during argument of motion to direct a verdict, 83 C 320
- verdict should be directed in absence of evidence showing how the plaintiff's injury was received, 83 C 713
- on appeal from directed verdict, question is whether jury, as reasonable men informed in the law, could reach any other conclusion, 84 C 1
- correctness of refusal to direct a verdict determined by same considerations as refusal to set aside verdict, 85 C 334
- if jury finds against one on a material point, denial of motion to set aside or direct verdict is good, 87 C 164
- no verdict directed on contradictory evidence, 87 C 311
- error to direct verdict on mistaken assumption of facts, 88 C 16
- verdict can be directed in a will case, 88 C 93
- certification of evidence and rulings essential to review action of trial court in directing a verdict, 88 C 94, 91 C 430
- direction proper where facts undisputed, and sole issue is of law, 89 C 117, 96 C 319
- verdict not directed where evidence was circumstantial, 89 C 117
- in absence of evidence or summary of it, Supreme Court cannot say trial court erred in directing verdict, 90 C 41
- not directed on ground of contributory negligence unless evidence makes any other conclusion impossible, 90 C 139
- verdict directed if plaintiff's evidence shows him negligent, 91 C 301
- on appeal from directed verdict, appellant's testimony is presumed to be true, 91 C 301
- difference between statement of issues when directing verdict and at opening of trial, immaterial, 91 C 431
- if verdict directed on ground of lack of evidence to prove falsity or malice in libel, it is harmless to erroneously exclude evidence to prove some other issue, 91 C 431
- Article I, § 7 of the Connecticut constitution, providing for trial by jury in libel actions, does not prevent direction of verdict in civil action, 91 C 432
- right to direct verdict is practiced by federal court, 91 C 432
- directed verdict may be set aside by trial judge, 92 C 252
- if error, a new trial may be granted; question may be raised by bill of exception, 92 C 252
- failure to direct a verdict is not ground of error; remedy is motion for new trial for verdict against evidence, 93 C 454
- verdict may be directed if evidence admits negligence and plaintiff's responsibility, 95 C 48
- judge need not explain to jury reasons for directing verdict, 95 C 252
- if he does, it is not a charge, 95 C 252
- errors in charge immaterial if verdict is properly directed, 95 C 252
- court should direct verdict where lawful conclusion from subordinate facts essentially a question of law, 96 C 319
- in criminal case, court cannot direct a verdict, 96 C 637
- where court might have directed verdict, criticism that he "almost did" is not well-founded, 97 C 708
- direction improper if more than one conclusion is humanly possible, 98 C 567, 100 C 476, 103 C 675
- power to be used with care as same result may be obtained by setting improper verdict aside, 98 C 567, 103 C 675, 111 C 588
- verdict should be directed where dependent on rule of law or facts are undisputed, 100 C 274
- on appeal from, all evidence and exhibits should be made part of the record, 100 C 274
- appeal from direction of verdict presents sole question whether this was correct and reason stated by trial judge immaterial, 100 C 276
- refusal to direct verdict not appealable, 100 C 490, 551
- directed verdict may be set aside, 100 C 527
- direction proper where construction of contract as to implying a condition depends on undisputed facts and is therefore for court, 100 C 582
- where verdict directed for accused, State's appeal raises question whether evidence warranted any other verdict, 100 C 637
- power to direct in criminal case should be sparingly and carefully used, 100 C 638
- only issue is whether evidence warranted any other verdict, 100 C 637
- sufficiency of information not an issue, 100 C 637

verdict not to be directed where upon the evidence the jury might reasonably reach opposite conclusion, 102 C 383, 107 C 394, 109 C 159

one of two sued jointly for tort cannot complain of direction of verdict for other, 103 C 29

interest of losing defendant in directed verdict in favor of codefendant, 103 C 29

truth of plaintiff's testimony to be assumed if jury could reasonably have found facts testified to, 103 C 380, 107 C 395

motion for directed verdict proper only after both parties have rested, 104 C 447

—granting motion gives rise to final judgment, 104 C 447

various statements of the rule as to when direction of verdict is proper, 105 C 1

verdict may be directed when facts present only a question of law, 107 C 368

error in refusal requires new trial, 107 C 728

motion to direct verdict should be granted only in exceptional cases, 109 C 158

plaintiff entitled to have evidence taken in light most favorable to his claims, 109 C 159

if mind of a fair and reasonable man could reach only one conclusion, question becomes one of law and verdict may be directed, but if room for fair disagreement, then issue should go to jury, 116 C 443

appeal from denial of motion to set aside directed verdict proper, 119 C 538

evidence must be considered in that aspect most favorable to plaintiff, 124 C 61

in suit for conversion where facts are susceptible of but one inference direction of verdict proper, 124 C 66

denial of motion for directed verdict is not ground of error, 124 C 569

directed verdicts not favored; if evidence reasonably supports any of allegations of negligence, plaintiff entitled to new trial, 129 C 462

§ 10. —Particular Cases

where plaintiff's own evidence shows case within Statute of Limitations, judge should direct, 64 C 426

directing verdict for damages for plaintiff in replevin against several, where one defendant may be found not to have detained goods, is error, 77 C 461

where evidence shows negligence of plaintiff or lack of it by defendant, direction of verdict for defendant is proper, 82 C 665

direction of verdict for defendant in negligence case reversed where child nine years old was plaintiff, 83 C 456

if there is no evidence to show how a personal injury was received, verdict should

be directed for defendant, 83 C 713, 86 C 509

not to be directed for holder of note if there is conflicting evidence on question of fraud in getting it, 89 C 128

in accident suit, *held* error to withdraw certain questions from jury and direct a verdict, 90 C 21

in contributory negligence, verdict will not be directed for defendant if other conclusions are reasonably possible, 90 C 139

where a notice to quit could only be construed one way, a verdict should be directed, 91 C 153

court cannot direct verdict where question of agency is not a matter of law, 91 C 350
directing verdict on ground that train crew were not servants of defendant, error, 92 C 322

directed verdict *held* erroneous as plaintiff was not clearly guilty of contributory negligence; he was on track but with truck between him and car, 92 C 594

action of trial judge in directing verdict for defendant in automobile negligence case sustained, 95 C 208

as between witnesses who testified that they heard no signal of approaching train and those who said they heard it, jury may find no signal; error to direct verdict, 98 C 567

in action for rent, direction of verdict for defendant error when existence of lease in issue; but harmless where lease illegal and no recovery possible, 102 C 346

in action by servant for personal injuries under Federal Employers' Liability Act, verdict for defendant properly directed, 102 C 361

where court twice enumerated possible verdicts and then recalled jury to add another, *held* not to constitute attempt to direct verdict, 105 C 757

where passenger in automobile did not prove heedless or reckless disregard, verdict *held* properly directed, 108 C 372

where medical testimony failed to show any direct physical injury or return of fever as claimed from use of medicine containing particles of broken glass, verdict properly directed where only damage claimed was physical injury, not fright or mental disturbance, 109 C 350

upon consideration of testimony of plaintiff's expert in malpractice case, *held* that case was one for jury, 112 C 407

dealer not liable for negligence of prospective purchaser driving car on trial; verdict properly directed, 112 C 684

where there were no eyewitnesses, but deceased's movements before accident were testified to, *held* issue of due care should have been submitted to jury, 113 C 274

§ 10 Verdict

court's statement that there was no evidence supporting plaintiff's case was practically directing verdict and erroneous, 113 C 545
decedent killed by plaintiff's car; no evidence, circumstantial or direct, of due care and directed verdict for defendant sustained, 113 C 790

willingness to execute releases which would not naturally be executed until agreement calling for them was otherwise performed need not be proved, 114 C 614

plaintiff injured from improper functioning of fire escape; *held* issue of control in and negligence of landlord should have gone to jury, 115 C 437

upon whole evidence *held* that G at time of accident was delivering sand on own account and not as agent for C, and directed verdict for latter was correct, 116 C 116

woman injured by falling down open stairway from defendant's restaurant; verdict improperly directed on issue either of negligence or contributory negligence, 116 C 443
properly directed for city in highway defect case; no presumptive or constructive notice of slippery sidewalk, 116 C 522

collision between automobile and train at grade crossing; verdict properly directed for defendant as freedom from contributory negligence not proved nor reckless or wanton misconduct by defendant, 116 C 638

plaintiff not guilty of contributory negligence as matter of law because she did not use special care in walking on floor she knew was oiled; verdict improperly directed for defendant, 116 C 706

erroneously directed for defendant in case under guest statute, where defendant, with three others in his one-seated car, crashed with great speed (at which intestate had protested) into rear of truck with lights and reflector, 116 C 713

O, employed by M, ran over plaintiff after completion of day's work on way from office where he was employed to other office of M where he was going for sole purpose of seeking advancement on unearned commissions; *held* O not within scope of employment and verdict for M properly directed, 117 C 64

both plaintiff's and defendant's intestate in same car killed in collision, and no direct testimony; *held* upon facts question of negligence and contributory negligence too conjectural to warrant verdict against defendant, 117 C 271

defendant not liable for attack made on plaintiff by cat in former's store in absence of knowledge that it was vicious, 117 C 668

—that clerk said at time that they were going to get rid of cat, not basis for inference that reason was because cat was known to be vicious, 117 C 668

plaintiff had entered intersection and proceeded some distance before defendant entered it and jury could have found that he had done so in exercise of reasonable care and therefore had right of way; *held* whether plaintiff was thereafter in exercise of reasonable care in proceeding through intersection question for jury, 117 C 676

plaintiff, who was engaged to repair jack owned by C, drove to town with latter to get required part; *held* jury might have found mutual benefit and court erred in directing verdict for C on ground that case came within guest statute, 119 C 537

car in which plaintiff was riding skidded and collided with car of defendant A, in which A was proceeding on own proper side of road at thirty miles per hour; *held* verdict properly directed for A, 119 C 537

where driver of truck hired from M by town was negligent, in suit against both verdict directed for town was equivalent to directing one against M, 120 C 140

—and both plaintiff and M entitled to new trial, 120 C 140

workman struck by truck while he was in middle of road in pursuance of duty; court erred in directing verdict for defendant, 120 C 553

where plaintiff in action for negligence should have proceeded against principal employer under Compensation Act, court directed verdict for defendant, 122 C 185

refusal to direct verdict for conversion of stock certificates proper where question whether they were pledged or not was disputed, 123 C 202

refusal to direct verdict for conversion of stock certificates proper where question whether they were pledged or not was disputed, 124 C 202

denial of defendant's motion for acquittal in criminal prosecution at close of State's case and for directed verdict of acquittal at close of evidence, not proper grounds of appeal, 124 C 556

failure to maintain lines designating crosswalk full width of street and maintenance of yellow light where traffic lights were out of repair could not be found nuisance by jury, 126 C 525

directed verdict sustained where plaintiff fell down stairs of defendant's tenement in absence of actual or constructive notice of any defect, 129 C 461

§ 11. Sustained or Set Aside

§ 12. —In General

no objection to verdict that jury were not returned to a reconsideration, 5 C 71

allowance of motion for new trial for verdict against evidence imports dissatisfaction with verdict, 5 C 71, 26 C 591, 27 C 114

—whether so stated or not, 26 C 591
 overruling motion to set aside verdict not filed within twenty-four hours is no ground of error, 12 C 219
 test of verdict is not whether the court would thus have found, but whether there was evidence to justify the verdict given, 19 C 300
 courts reluctant to interfere with verdict of jury, 21 C 245, 361
 jury's belief in testimony is not reviewable; but court may draw different inferences, 27 C 114
 jury bound only to view evidence fairly and dispassionately, 29 C 244
 court can, in its discretion, allow longer time to file motion than twenty-four hours and may allow amendment, 41 C 268
 power to set aside and legislation as to it reviewed, 64 C 61, 75 C 678, 81 C 624
 power to set aside, but not advisability of setting aside, may be reserved for Supreme Court, 64 C 73
 action on motion to set aside cannot raise questions as to admission of evidence, 66 C 264, 90 C 280
 failure of defendant to produce evidence considered in sustaining finding, 66 C 578
 rules the same in criminal case, 69 C 190, 74 C 638, 79 C 481, 81 C 22, 97 C 462
 history of power to grant new trial for verdict against the evidence, 69 C 191
 power to set aside verdict is not opposed to requirement of trial by jury, 74 C 68, 86 C 224
 in acting on motion to set aside, judge should use his knowledge of motives that move men, etc., 74 C 68
 discretion of court to receive motion to set aside after twenty-four hours, 75 C 679
 defense which should have been specially pleaded not available under motion to set aside, 80 C 206
 in determining whether verdict should have been set aside, all evidence is read in light of the instructions, 81 C 670
 motion for new trial for verdict against evidence is not the remedy for a variance, 82 C 344, 97 C 492
 motions of little merit discountenanced, 83 C 173
 if motion to set aside verdict granted, it is of no consequence that trial court of its own motion previously ordered it to be set aside, 83 C 445
 all evidence to be considered in determining whether verdict should have been set aside, 84 C 262
 trial court in passing on motion to set aside should review evidence to see what jury might or might not have reasonably found, 86 C 320
 refusal to direct a verdict does not preclude court from setting it aside, 90 C 18

no way of certainly telling items considered by jury in making up its verdict, 90 C 637
 constitutional limitation on power to set aside, 91 C 457
 trial judge can set aside a verdict already directed by him, 92 C 252
 nonsuit does not operate as a motion to set aside verdict as against evidence, 93 C 96
 history of power of courts to grant new trial, 94 C 505
 where liability was claimed on three grounds, and court charged jury that two were insufficient, on new trial ordered after plaintiff's verdict on other, all three grounds still open, 97 C 85
 appeal from refusal to set aside verdict where evidence is conflicting is an abuse of procedure, 98 C 584
 —though appellant prevailed upon whole case, costs of printing evidence not granted him, 98 C 584
 Supreme Court will not assume jury disbelieved witness where records afford no basis for that conclusion, 99 C 17
 verdict may be set aside though directed, 100 C 527
 right to trial of facts by jury as limitation on power to set aside verdicts, 103 C 683, 104 C 419
 motion to set aside to be considered in light of evidence admitted, not of evidence admissible, 104 C 302
 motion not to be readily granted nor without strong reasons, 107 C 164
 —but should be where court acting reasonably feels bound in duty to do so, 107 C 164
 where plaintiff gives conflicting versions of how accident occurred, it is for jury to decide, 107 C 236
 —if trial court refuses to regard this as sufficient to set verdict aside, this entitled to great weight, 107 C 236
 —not to be expected plaintiff who has received severe injury will precisely recollect events just preceding, 107 C 236
 inherent power of court to prevent manifest injustice, 108 C 202
 in criminal case tried to court, motion to set aside verdict should be dispensed with, 109 C 124
 effect of visit to premises by trier, 109 C 212
 evidence, since verdict, of perjury of plaintiff not basis for motion, 109 C 324
 —proper remedy motion for new trial on ground of newly discovered evidence, 109 C 324
 court may, at same time, withdraw memorandum of decision denying motion to set verdict aside and grant motion, 109 C 481
 where only small amount involved, underlying question is whether large expense and loss

§ 12 Verdict

of time involved in new trial is justified, 110 C 536

failure to make motion to set aside verdict implies verdict could be reasonably arrived at if charge was correct, 111 C 260

effect of contradictory evidence on direct and cross-examination, 112 C 407

—jury may accept one expert opinion as opposed to others, 112 C 410

where verdict erroneously set aside and on appeal judgment ordered on it, judgment should not include interest, 112 C 452

—but judgment might be entered nunc pro tunc as of date of verdict and so have interest, 112 C 452

motion to set aside verdict does not raise question of legal sufficiency of pleadings, but only whether under evidence jury might reasonably reach conclusion it did, 112 C 459

—this may involve legal effect of evidence, 112 C 466

—as where infant pleaded avoidance of contract and question was whether it was voidable, 112 C 466

jury must be assumed to have allowed damages for expenditures which were not proper elements but were not questioned, 113 C 407

plaintiff must not only prove case, but must prove damages to be entitled to verdict, 113 C 442

where court properly set verdict aside because defective in form, not necessary to consider its ruling that verdict was against evidence, 115 C 704

trial court has inherent power to set aside verdict as against the evidence without motion, 119 C 637

—should do so where plaintiff not entitled to recover as matter of law, 119 C 637

motion to set aside verdict to be filed within twenty-four hours after verdict accepted; Saturday afternoon not excluded in computing time, 121 C 364

motion to set aside verdict as against weight of evidence not proper; function of trial court or jury to weigh evidence, 123 C 1

—only question which can be raised by such motion is legal sufficiency of evidence to support verdict, 123 C 3

one defendant could not be aggrieved by granting of motion to set aside verdict against another defendant, 123 C 151

inquiry not limited to test of reasonableness of particular theory of how accident happened, which finding discloses as contention of plaintiff at trial, 123 C 606

presumed that court properly charged jury upon the law, 124 C 511

if jury erred in finding one defendant not liable this would afford no ground for setting

verdict aside as against other defendant, a joint tortfeasor, 126 C 127

court has no greater latitude in testing justification for verdict in an appeal from probate, where right to jury trial is conferred by statute, than in ordinary case; in neither case can it pass on weight of evidence if jury acted reasonably, 126 C 294

jury entitled to draw all reasonable inferences, 127 C 87

if court warranted in setting aside verdict for any sufficient reason, placing its action upon a wrong ground not error, 127 C 343

reversal of ruling on motion to set aside verdict during same term of court permissible, 128 C 56

right of jury to draw inferences from circumstantial evidence, 129 C 378

test of validity of jury's determination, 129 C 382

§ 13. —General Rules as to When Verdict Should Be Sustained

every reasonable construction should be made in support of verdict, 1 R 321

new trial never granted if the verdict is consistent with justice, 2 R 115, 12 C 226

verdict merely against preponderance of evidence is not sufficient for new trial, 19 C 319

where some evidence supports verdict, motion should be denied, 70 C 446, 73 C 136, 74 C 71, 77 C 625, 79 C 414, 80 C 300, 374, 81 C 495, 83 C 171, 261, 84 C 262, 85 C 111, 86 C 249, 252, 289, 335

verdict not set aside if not unreasonable and evidence is conflicting, 74 C 638, 79 C 314, 83 C 171, 386, 597, 87 C 253, 585, 691, 88 C 136, 220, 265, 495, 90 C 18, 76, 252, 497, 706, 91 C 211, 596, 92 C 658, 95 C 694, 97 C 174

want of evidence as to one unessential fact will not justify setting verdict aside, 79 C 81

that jury believed one witness rather than several others not ground for new trial, 79 C 463

refusal to set aside verdict because of credibility of witnesses and weight of evidence not disturbed on appeal, 81 C 623, 82 C 610, 86 C 98

if evidence supports either of two defenses and counterclaim, verdict for defendant will stand, 82 C 647

not set aside for rulings on evidence that are of slight importance or the allowance of which is in the court's discretion, 83 C 183

conclusion drawn by jury from variety of circumstances is not reviewable unless unreasonable, 84 C 632, 86 C 98

if jury is charged to find for defendant provided they find certain facts true, and they

- find for plaintiff, motions directed against the verdict are properly denied, 87 C 164
- if sum awarded by verdict is small and cost of another suit considerable, verdict not likely to be set aside, 87 C 165
- verdict not set aside because plaintiff's testimony partially corroborated, was contradicted by defendant, 87 C 253
- not set aside where evidence to support it, 88 C 269
- verdict not set aside if evidence capable of different interpretations, 88 C 495
- not set aside if jury determines negligence where there is a dispute as to inferences to be drawn from the evidence, 89 C 21
- not set aside if jury accepts story of bystanders rather than participants, 89 C 237
- if jury could find for either party, verdict is not set aside, 90 C 497
- that judge disagrees with jury as to preponderance of evidence is not enough, 91 C 404
- verdict stands if reasonable, no bias, prejudice, corruption, or impropriety, 92 C 85
- not set aside if conclusion could have been reasonably reached on the evidence, 93 C 382, 94 C 475, 95 C 466, 534, 695
- verdict not set aside if there is nothing incredible in plaintiff's story, 94 C 501
- if the evidence presents any reasonable cause of action within the law and issues, a verdict of the jury in favor of plaintiff should not be set aside, 95 C 431
- verdict jury might have reasonably and fairly found on conflicting evidence not disturbed, 97 C 174
- even in murder case verdict cannot be set aside if evidence is conflicting, 98 C 454, 103 C 468
- verdict reached upon conflicting evidence will not be disturbed, 99 C 22, 582, 731, 100 C 749, 101 C 545, 105 C 366, 106 C 726, 109 C 501, 112 C 670, 686, 113 C 730
- in criminal case, possible hypothesis of innocence not enough where jury might properly find against any reasonable hypothesis, 99 C 103
- should not be set aside when it could be reasonably reached upon the evidence, 99 C 197, 100 C 123, 279, 286, 361, 580, 749, 101 C 586, 683, 102 C 529, 104 C 382, 105 C 628, 640, 106 C 72
- weight of evidence and credibility of witness exclusively for jury, 100 C 13, 104 C 28
- if there is some evidence on which jury could reasonably reach conclusion verdict must stand, 101 C 503
- if reasonable men might differ as to contributory negligence verdict must stand, 103 C 521
- but if no room for doubt court may set it aside, 103 C 526
- error to set aside verdict which could have been reasonably reached by reasoning minds, 104 C 28
- if there is reasonable basis for such a conclusion, it is presumed jury rejected evidence opposed to verdict, 104 C 34
- that verdict is against great weight of evidence, no ground for setting it aside, 104 C 229, 355, 105 C 366, 371
- all rules for setting verdict aside based on principle that jury could not reasonably have reached its conclusion, 104 C 229
- not set aside where jury might reasonably have found theory of either defendant or plaintiff proven, 104 C 740
- law the same in murder case as in any other case, 106 C 701
- rule as to when verdict may be set aside restated, 106 C 701
- effect of statutory requirement as to testimony of two witnesses, 106 C 701
- if it can be sustained upon either of two causes of action stated in complaint, error as to other nil sig., 107 C 197
- negligence and wilful or wanton misconduct, 107 C 197
- motion not granted where only nominal damages could be recovered, 108 C 97
- if fair-minded men might reasonably differ, verdict must stand, 108 C 165
- if any evidence reasonably supports verdict, though trial court does not credit it, verdict should not be set aside, 109 C 501
- jury has right to pass on credibility of evidence and any evidence reasonably supporting verdict must be accepted as true, 109 C 501
- verdict upon conflicting evidence not set aside unless unreasonably reached in manifest violation of established rule, 112 C 678
- court not justified in granting motion merely because it disbelieved witness, 112 C 679
- cannot be assumed that jury was overborne by sympathy aroused from plaintiff's emotion on stand, 113 C 462
- plaintiff has right to have credibility of his witnesses decided by jury; setting aside verdict because court did not believe them erroneous, 113 C 730
- sufficient to sustain verdict that jury might have found it more probable than not that defendant's negligence caused death, 115 C 352
- only in rare case that jury must accept as true evidence offered before them, for credibility of witnesses is peculiarly within their field, 118 C 66
- trial court may not ordinarily substitute its conclusion for theirs, 118 C 67, 120 C 412, 681
- it is province of jury to determine credibility and weight of testimony, 119 C 244, 121 C 400, 480

§ 13 Verdict

—conclusions not to be disturbed unless it is apparent they acted from prejudice, partiality, corruption, etc., 119 C 244

for jury to pass on credibility of testimony and determine which version of accident was true, 121 C 480

verdict may be set aside in rare case where physical facts resolve apparent conflict in evidence by showing that testimony is untrue, 126 C 153

evidence must be sufficient to produce a reasonable belief of the probability that the elements necessary to recovery existed, 127 C 63

peculiarity of circumstances surrounding accident may furnish support for defendant's verdict, but trier given wide latitude in drawing inference of negligence, 129 C 585

§ 14. —General Rules as to When Verdict Should Be Set Aside

new trial may be granted for verdict manifestly against evidence, 1 C 472, 4 C 426, 9 C 101, 12 C 393, 23 C 284, 24 C 132, 26 C 591

—also for verdict without evidence, 12 C 487

new trial granted for misapplication of testimony by jury, 6 C 49

—where weight of evidence is disregarded, 6 C 185

—also where verdict is supported only by one impeached witness, 8 C 319

new trial should not be granted unless it appears that there is manifest injustice, mistake in the application of legal principles, or corruption or prejudice, 9 C 106, 12 C 213, 486, 19 C 320, 21 C 245, 26 C 398, 29 C 123, 30 C 310, 52 C 449, 64 C 134, 68 C 294, 69 C 186, 302, 651, 72 C 635, 75 C 129, 79 C 99, 270, 477, 90 C 74, 92 C 85, 95 C 45

verdict must be manifestly against weight of evidence for new trial, 9 C 134, 11 C 440, 13 C 185, 342, 19 C 319, 20 C 38, 570, 21 C 245, 23 C 604, 30 C 310, 63 C 374

set aside only in a clear case, 11 C 446, 12 C 212

—and where manifest injustice is done, 11 C 446, 13 C 333, 342, 26 C 398

power to grant new trial where evidence entirely mistaken by jury to be cautiously exercised, 13 C 328

it must appear that jury adopted some wrong principle, or that their minds were not open to reason, 26 C 591

new trial not granted to enable a party to recover nominal damages merely, 29 C 123

new trial for verdict against the evidence more readily granted if question involved is a mixed one of law and fact, 40 C 406

—as most cases of negligence and constructive fraud, 40 C 406

power of trial judge over verdict essential

part of the jury system, 75 C 678, 76 C 495
granting of motion for new trial for verdict against evidence upheld where evidence failed wholly to support verdict, 76 C 496

power to set aside verdict not limited to cases where entire verdict was against evidence, 81 C 101

when a verdict can be set aside, 81 C 624, 84 C 262, 85 C 255, 86 C 98, 249, 252, 289, 335, 87 C 363, 691, 88 C 42, 136, 208, 220, 494, 90 C 18, 91 C 457

verdict set aside when damages awarded are plainly excessive or exorbitant or when some principle of law has been mistaken or misapplied, or when judicial discretion has been manifestly abused, 82 C 70, 291, 84 C 518

verdict not set aside as contrary to evidence unless there is a mistake in legal principles, prejudice, corruption, partiality, 83 C 170, 87 C 253, 91 C 457, 92 C 85, 96 C 31, 97 C 182

must be set aside if manifest injustice done, 84 C 262, 97 C 462

verdict supported by substantial evidence not disturbed unless clearly the result of passion, prejudice or misconduct of jury, 86 C 252

if essential facts are not supported by the evidence, new trial granted, 86 C 698

error must be of a substantial character to set aside a verdict, 87 C 341

if evidence is so conclusive as to make matter a question of law, new trial may be granted, 87 C 623

set aside if unjust, due to prejudice, corruption, or partiality, even if evidence is conflicting and some evidence in favor of prevailing party, 90 C 18, 74, 95 C 45

set aside when based on evidence of single witness that is unsatisfactory, improbable, at variance with others and the facts and circumstances of the case, 92 C 216

may set aside where burden of proof not sustained, 94 C 125, 468, 475

verdict set aside if evidence only furnished a mere surmise, 94 C 475

in criminal case, to warrant new trial verdict of guilty must be palpably and manifestly against the evidence, 96 C 640, 97 C 462

verdict set aside if there is no logical basis for the inferences drawn by the jury, 97 C 85

—unless there is some evidence on which jury could reach conclusion, 97 C 85

verdict not to be set aside unless plainly denoting mistake or prejudice, 97 C 188

verdict inconsistent with facts cannot stand, 97 C 419

injustice must be manifest and the wrong so plain and palpable as clearly to denote a mistake by jury as to law, or to justify suspicion that at least some of them were

influenced by corruption, prejudice or partiality, 97 C 462, 99 C 103, 102 C 481
 verdict based only on surmise and conjecture should be set aside, 99 C 677, 101 C 445, 102 C 61, 108 C 659
 should be set aside when no evidence to support it, 100 C 99
 —or if it plainly indicates partiality on part of jury, 100 C 100
 where evidence substantially uncontradicted, a verdict which could not be reasonably reached upon it should be set aside, 101 C 340, 499, 102 C 156, 529
 when verdict may be set aside in criminal case, 101 C 503
 verdict contrary to indisputable physical facts must be set aside, though testimony conflicting, 104 C 229, 516, 106 C 447, 701, 107 C 17, 114 C 647, 117 C 110
 verdict which could not have been reasonably reached by fair and intelligent men acting reasonably cannot stand up on appeal, 105 C 628
 verdict so defective a judgment cannot be rendered thereon should not be accepted; if accepted, it should be set aside, 105 C 774
 verdict rendered on issue not within pleadings should be set aside, 107 C 491
 if verdict manifestly unjust and so against evidence as to indicate jury made some mistake in law or were influenced by lack of knowledge or understanding or by corruption, prejudice or partiality it will be set aside, 108 C 202
 —though there is some conflicting evidence, 108 C 202
 —where testimony of plaintiff is obviously untrue, trial court erred in holding it had no right to set aside verdict in his favor, 108 C 202
 action in setting aside verdict for improper remarks cannot be reviewed in absence of finding of facts, 108 C 285
 when a verdict should be set aside, 108 C 462
 rule for setting aside as against evidence, 109 C 528
 duty of court to set aside verdict so palpably against evidence as to indicate mistake or lack of understanding by jury, 113 C 729
 verdict not set aside unless it clearly appears that jury acted unreasonably or was motivated by improper considerations or judge exceeded his discretionary control over verdict, 114 C 479
 action of jury may be as unreasonable in passing on credibility of witnesses as in any other respect, 119 C 241
 —operation of such influences may be manifested by acceptance of evidence irreconcilable with law of mechanics or indisputable physical facts, 119 C 241

—but verdict may not be set aside unless record discloses that jury could not fairly and reasonably have believed the testimony, 119 C 241
 general rule as to setting aside, 124 C 471
 resumé of situations where verdict may be set aside, 126 C 462
 where evidence of loss of profits leaves matter of damages one of conjecture, verdict cannot stand, 126 C 597
 jury may draw inferences and also inferences based on inferences; verdict not to be disturbed unless inferences so unreasonable as to be unjustifiable, 127 C 543
 test for setting aside verdict in criminal case, 127 C 553
 under exceptional circumstances verdict may be set aside even if some evidence in favor of prevailing party, 127 C 633
 duty to set aside verdict where jury have clearly failed to follow rules of law laid down by court, 127 C 680

§ 15. —Misconduct of or Irregularities respecting Jurors; Errors in Charge or Rulings; Argument of Counsel

an objection to a juror, which is not ground for a principal challenge, not ground to set verdict aside, K 133
 verdict set aside for evidence given by juror to his fellows, 1 R 523
 where jury separated before they agreed on verdict, verdict subsequently returned will be set aside, 3 D 287
 comments of judge to jury after verdict, on question of accepting verdict, on weight of evidence and points of law, not ground for new trial, 4 D 403
 new trial may be granted for wrong instructions given in returning jury, 9 C 107
 when misconduct of juror will justify new trial, 13 C 450
 that juror is not an elector, 13 C 453
 conversation of juror with outsider, 29 C 101, 38 C 115, 41 C 268
 —furnishing libelous pamphlet to juror, 38 C 115
 that accused has second cousin on panel no ground for new trial, though plea was hereditary insanity, 29 C 101
 for improper argument of counsel, 72 C 202, 74 C 638, 700, 83 C 160, 183, 702
 misconduct of juror, 80 C 314, 82 C 258, 84 C 518, 95 C 556
 statute that, in criminal action, no irregularity in summoning jury shall be ground for setting verdict aside, construed, 80 C 614
 verdict cannot be complained of because of improper proceedings of counsel, if no complaint is made at the time and no request to dismiss the jury, 83 C 702
 thoughtless remark of juror to witness, no ground for setting aside, 84 C 518

§ 15 Verdict

remarks calculated to arouse bias which judge charges jury to disregard are not sufficient, unless harm has been done, 86 C 100

not set aside for improper argument unless objection is made before verdict, 86 C 100

verdict should not be disturbed for slight inaccuracies in a single expression in a charge, 86 C 265

chance visit of juror to locus in quo not grounds for setting verdict aside where adverse party is not connected with the act and no harm done, 87 C 363

presence of newspaper in jury room with article against accused, not known to jury and not read by them, is no ground for setting verdict aside, 90 C 79

court may uphold action of trial court in setting aside verdict where by bill of exceptions charge appears erroneous, 92 C 252, 365

testimony of a juror not received to set aside a verdict on ground of mistake or misconduct, 95 C 556

finding various sums written on slips of paper in jury room does not show verdict was determined by lot, 95 C 556

improper conduct of counsel in presence of jury while viewing premises, 99 C 256

verdict improperly set aside where court misconceived law de risk of loss from destruction of property sold conditionally, 101 C 575

that boxes of candy, admitted as exhibits, were missing after deliberations of jury, not ground for new trial, 104 C 54

refusal of trial court to set aside for improper argument sustained where verdict not influenced by argument, 105 C 446

trial court should use great care in setting aside verdict for error in charge, 106 C 310

—should do so only where error is unmistakable and harm unquestionable, 106 C 310

that verdict may have been reached by compromise *held* not ground for setting it aside, 106 C 329

claims that verdict was against evidence, was excessive, was induced by erroneous charge and improper argument all proper grounds for new trial, 107 C 17

—motion in arrest or for new trial not necessary, 107 C 17

motion to set verdict aside as against evidence does not include ground of improper argument, 108 C 285

—inherent power of court without motion to set verdict aside for error in charge, rulings or otherwise, 108 C 285

—to be sparingly used, 108 C 285

—expense of further proceedings to be regarded, 108 C 285

verdict will be set aside if books, papers and documents calculated to influence it are improperly submitted to jury, 109 C 722

—test is not whether jury actually made use of them, 109 C 722

court has inherent right to set aside a verdict because of error in its instructions, 115 C 678

—but power should be cautiously exercised, 115 C 683

remark of plaintiff's counsel suggestive that case was being defended by insurance company not sufficient to disturb verdict where defendant did not move for mistrial but elected to go to jury, 117 C 478

court not justified in setting aside verdict on ground of unfair argument of counsel where it was not asked to withdraw case from jury, 119 C 241

argument of counsel that plaintiff related to witnesses and counsel and had everything to gain and nothing to lose, not so prejudicial as to require setting verdict aside, where no objection was raised and relationship was proved in testimony, 119 C 390

court sustained in setting aside verdict for failure to charge de statute requiring lights on parked car after dark, 120 C 412

where complaint stated negligence at common law and supervening negligence, and there was general verdict for plaintiff with no interrogatories, *held* where there was error in charge as to negligence verdict should be set aside, 120 C 412

while privilege of counsel in addressing jury should not be too closely narrowed, it must never be used as license to state or comment upon or suggest an inference from, facts not in evidence, 120 C 494

—where verdict has been influenced thereby it should be set aside, 120 C 494

motion to set aside verdict usual procedure in seeking relief from improper argument of counsel, 121 C 322

setting aside by judge for error in his charge should be exercised with great caution and never done unless error unmistakable, 126 C 570

§ 16. —Review of Action of Trial Court; Discretion

motion for new trial for verdict against the evidence is addressed to the discretion of the court, 11 C 440, 25 C 223

refusal to set aside verdict not considered on appeal unless court abused its discretion, 64 C 61, 73 C 115, 76 C 496, 77 C 150, 623, 80 C 314, 84 C 518, 85 C 611, 89 C 290, 90 C 18, 91 C 457, 92 C 576, 93 C 476, 554

every presumption supports action of trial court, 64 C 480, 75 C 677, 76 C 495, 77 C 625, 79 C 477, 80 C 58, 84 C 262, 86 C 223, 90 C 18, 94 C 559

- as to effect of delay in acting on motion, 73 C 136, 75 C 678, 78 C 9
- weight to be given to action of trial judge, 69 C 512, 70 C 444, 75 C 127, 675, 79 C 477, 82 C 71, 84 C 262, 90 C 18, 74, 94 C 559, 97 C 187, 462
- rule same even in capital case, 81 C 22, 97 C 462
- advantage of trial judge in viewing witnesses, etc., to be considered, 75 C 127, 80 C 206
- power of judge over verdict as part of jury system, 75 C 675, 76 C 495, 81 C 347, 86 C 223
- cases cited which have stated and discussed principles governing action of Supreme Court on appeals from action of trial court on motion, 79 C 99
- where evidence sufficient to support verdict, and suitable instructions by court, not disturbed on appeal, 79 C 414, 96 C 20
- setting aside a verdict is reversed only when a principle of law has been mistaken, misapplied, or where discretion has been abused, 82 C 70, 93 C 475
- use of judge's memorandum in passing on judge's action in setting aside verdict, 86 C 98
- on appeal from setting verdict aside, action of trial judge only considered; of jury indirectly, 86 C 223
- action of trial court on motion to set aside not disturbed where situation peculiarly within its discretion, 89 C 290
- discretion of court means legal discretion, 90 C 18, 91 C 457
- on appeal court not bound to follow trial court in refusing to set aside, 90 C 74
- trial court's discretion in setting aside verdict is limited by constitutional right of jury trial on disputed facts, 91 C 457
- setting aside verdict is not disturbed even if on wrong grounds, if it appears that it could be set aside on other grounds, 92 C 365, 95 C 248
- on appeal from refusal to set aside, evidence is to be read in the light most favorable to prevailing party, 94 C 120
- verdict set aside on erroneous ground not disturbed if it appears bad for other reasons, 95 C 248
- refusal of trial court to set verdict aside implies that there was evidence of every material fact, 99 C 680
- effect of view of premises by judge, 99 C 708
- trial court's action involves exercise of discretion and is entitled to great weight, 99 C 729, 101 C 62, 751, 102 C 529, 104 C 28, 229, 334, 516, 105 C 628, 106 C 283, 701, 727, 108 C 163, 109 C 58, 501, 110 C 406, 112 C 607, 113 C 729, 116 C 83
- whether trial court would have reached same conclusion as jury not decisive, 100 C 279, 104 C 229
- in reviewing denial of motion, evidence to be most favorably interpreted for appellee, 101 C 63, 103 C 520
- Supreme Court deals primarily with action of trial judge, not with action of jury, 102 C 448
- Supreme Court may review evidence to determine whether trial court abused discretion in setting aside verdict, 102 C 537
- function of Supreme Court on appeal from denial of motion to set aside, in capital case, 103 C 453, 106 C 704
- weight to be given action of trial judge in setting verdict aside, 103 C 683
- right to set aside limited by constitutional right to have jury pass on issues of fact on which parties can reasonably disagree, 103 C 683
- that court assigns wrong ground for setting aside verdict immaterial, 103 C 716, 104 C 382, 105 C 774
- every presumption supports action of trial court's decision upon motion to set aside, 104 C 233
- discretion of trial court limited by constitutional requirement that every issue be submitted to jury upon which there may be reasonable disagreement, 104 C 419
- rules governing action of Supreme Court on appeal from setting verdict aside, 104 C 516
- for jury to decide between conflicting versions of accident given by plaintiff, 107 C 236
- refusal of trial court to recognize them as sufficient to set verdict aside entitled to great weight, 107 C 236
- where verdict has been set aside, question on appeal is whether evidence left no room for reasonable disagreement on controlling issues, 108 C 505
- due weight to be given action of trial court and every presumption favors it, 108 C 505
- on appeal great weight to be given to action of trial judge, 109 C 58, 501, 117 C 488
- weight to be given decision of trial court, particularly where record indicates printed record may not truly represent effect of evidence of foreign witness, 110 C 406
- trial court cannot substitute its own judgment that testimony is incredible unless conclusion of jury could not be reasonably reached or is not legally permissible, 111 C 707
- weight is to be given to conclusion of jury backed by that of trial judge in refusing to set verdict aside, 114 C 479
- conclusion of court in refusing to set aside verdict entitled to great weight, 119 C 277, 121 C 343, 123 C 337, 124 C 403, 470
- appeal from setting aside verdict presents broad question whether ruling is sustainable on any ground, 119 C 581

§ 16 Verdict

discretion exercised by court will not be reviewed unless it clearly appears it has been abused or is illegal, 120 C 262

obviously greater opportunity of trial judge to evaluate statements of witnesses entitles his conclusions to great weight, 120 C 262

—where reasoning minds might reasonably differ conclusion of court will not be disturbed, 120 C 263

opportunity of court and jury to see and hear witness of particular significance where testimony in part through interpreter and plaintiff did not always understand, 124 C 118

action of judge who heard evidence and refused to set aside verdict entitled to great weight, 126 C 29

conclusion of trial court which saw all the witnesses and heard their testimony of great weight, 126 C 256

Supreme Court is confined to record and cannot consider matter not appearing or fairly deducible from it, 126 C 465

—that jury visited premises may also be considered, 126 C 465

when judge and jury agree, their combined judgment entitled to weighty consideration, 127 C 468

§ 17. —Miscellaneous Particular Cases

See also other titles such as AUTOMOBILE, HIGHWAYS, NEGLIGENCE, etc.

verdict should be set aside where jury upholds a sale which the law deems fraudulent, 21 C 362, 38 C 420

motion for new trial not granted where allegations are a contract to serve during testator's life and proof is to serve during his life and that of sister, no objections being made in court, 82 C 343

if case is returned by Supreme Court because plaintiff failed to prove due care, and additional evidence only weakened case, verdict for plaintiff can be set aside, 82 C 471

verdict against several tort feasons may be set aside as to some only, or all, if justice requires, 83 C 27

determination of terms of a contract partly written and partly oral is for the jury, 83 C 167

—new trial is not granted if their conclusion is not against the evidence, 83 C 167

verdict not set aside where evidence was that defendant was negligent and plaintiff did not comprehend risk to which he was exposed, 84 C 269

verdict not set aside for mispleading; petition for a new trial is the remedy, 85 C 586

verdict for plaintiff, based on his testimony, contradicted by his own witnesses, properly

set aside as unreasonable conclusion of the jury, 91 C 596

proper to refuse to set aside verdict of murder in first degree although judge in some doubt as to degree established by the evidence, 93 C 242

verdict for exact amount of plaintiff's claim does not mean that jury disregarded an instruction to allow an item to defendant, 94 C 613

where issue was loan of \$200 with claim of satisfaction by plaintiff taking certain furniture, verdict that \$50 be recovered properly refused as not responsive to the issue, 95 C 389

verdict against alleged principal set aside for lack of proof of agency, 100 C 123

no error in trial judge's subsequent decision setting aside directed verdict, 100 C 527

evidence *held* to justify jury's conclusion that proof of loss was made, 101 C 586

—where taken by one having ostensible authority of insurance company's agent, 101 C 586

where plaintiff failed to offer evidence that its compulsory payment of damages to one contractor was due to default of another, verdict in its favor should have been set aside, 105 C 11

ordinarily verdict not set aside where for nominal damages only, 106 C 167

—but will be when issue is pollution of stream because nuisance is of a continuing nature, 106 C 167

where inconsistent answers of foreign witness probably only result of misunderstandings with interpreter, verdict conclusive, 106 C 356

violation of rule forbidding attorney to appear as witness in case actively conducted by his partner not ground of new trial, 107 C 491

verdict upheld in criminal case though it depended on testimony of one who was accused and had perjured himself on his own trial as principal, 108 C 53

that evidence since trial proved perjury of plaintiff not ground for setting verdict aside, 109 C 324

—proper remedy is new trial for newly discovered evidence, 109 C 324

submission to jury of application of company to be made party plaintiff because of claim against it for compensation calculated to influence verdict, 109 C 722

—particularly in absence of instruction de compensation feature, 109 C 722

verdict finding that signature on documents was genuine and not forgery on conflicting expert testimony properly sustained, 114 C 694

court acted within discretion in refusing to set aside verdict because of newspaper article stating defendant was insured, and in refraining to comment thereon in charge, 115 C 563

where action was brought by guest in automobile against its driver and driver of another car which collided with it, court can set aside verdict as regards one defendant only, 115 C 680

display of emotion by plaintiff, husband of decedent, who broke down and wept on stand, not such as to require court to set aside verdict otherwise justified by evidence, 117 C 478

where plaintiff offered no evidence except relationship of driver and owner on issue of family car and they testified it was not and that driver not authorized to drive it, jury could disbelieve latter's testimony and find for plaintiff, 118 C 58

physical facts *held* not such as to require that verdict, based on plaintiff's testimony, be set aside, 118 C 385

court not sustained in setting aside verdict because it did not credit testimony of one H, an eyewitness, 120 C 414

court correct in refusing to set aside verdict for plaintiff which imported finding that loan was made to defendant, not to another, 120 C 618

verdict that testatrix was of sound mind at time of execution of will, properly sustained, 126 C 294

setting aside justified when charge did not clearly define issues and verdict was manifestly result of sympathy or prejudice, 126 C 570

where under court's instructions no damages were shown, verdict for plaintiff set aside, 127 C 680

in accident involving three cars, A obtained verdict in suit against B and C, and B obtained verdict in suit against C and on C's counterclaim; court erred in accepting first verdict and instructing jury they could not find for either B or C in other suit, 128 C 104

verdict for defendant who voluntarily assisted in loading truck with projecting girders, knowing it was to be operated in highway, sustained, 128 C 281

—no absolute nuisance, as matter of law, based on physical facts, 128 C 281

verdict not to be set aside because jury considered defendant's insurance, relationship with plaintiff and conduct of parties at trial, 129 C 62

defendant's testimony fell short of admission of negligence which would justify setting aside verdict in his favor, 129 C 62

§ 18. Excessive or Inadequate Verdict

§ 19. —In General

onus on party seeking new trial for excessive damages to show affirmatively, and to what extent, 19 C 319

—not enough to merely raise doubt as to fairness, 19 C 319

new trial not granted if damages are in great part a matter of opinion, 22 C 74

if damages excessive, motion should be for new trial for verdict against evidence, 29 C 147

new trial not granted unless damages are so excessive as to be unjust, 37 C 315

when new trial will be granted, 50 C 583

whole evidence should appear in the record to present question of excessive damages, 54 C 427

decision of trial court on motion to set verdict aside because damages excessive conclusive when, 72 C 731

—such motion discountenanced where exemplary damages may be given, 72 C 731, 90 C 625

setting aside verdict for excessive damages discretionary with trial court; that damages are excessive must clearly appear, 73 C 116

verdict for excessive damages in personal injury case not set aside unless palpably wrong, 82 C 291, 93 C 554, 95 C 693

verdict palpably inadequate may be set aside, 83 C 445, 90 C 93

damages reviewed when excessive, based on error, misconception, or improper motive, 85 C 24

amount of damages for jury; set aside only for injustice, mistake of rule of law, corruption, prejudice, partiality, 85 C 112, 255, 88 C 265, 640

in reviewing the setting aside of a verdict for excessive damages Supreme Court deals directly with action of trial judge, only indirectly with action of the jury, 86 C 223

jury's decision not disturbed on damages that have been estimated, 87 C 692

verdict not readily set aside as inadequate for death by wrongful act, 90 C 35

exemplary damages within discretion of trial court; where proper, motion to set aside as excessive not often of any avail, 90 C 624

cannot assume from amount of verdict how it was made up, 90 C 625

if damages are claimed to be inadequate, motion should be made to set aside verdict as a whole, not as to damages alone, 94 C 503

—question of liability and damages in personal injury case are usually inseparable, 94 C 503

—when proper to direct retrial of certain issues alone, 94 C 503

§ 19 Verdict

judgment for damages in personal injury case will not be modified in Supreme Court unless such damages are more than compensatory, 95 C 693

plaintiff cannot get new trial because defendant's damages on counterclaim are too small, 98 C 501

inadequate damages as ground for new trial, 98 C 508, 102 C 144

motion to set verdict aside as against evidence permits claim of inadequacy of damages, 100 C 612

—appeal to Supreme Court may be taken if such motion is denied, 100 C 612

opinion of trial judge is entitled to great weight, 101 C 62, 104 C 85, 113 C 525

where damages are excessive question is, does verdict fall within necessarily uncertain limits of fair and reasonable compensation, 101 C 62

—or does it so shock conscience as to compel conclusion that it was due to partiality, prejudice, mistake or corruption, 101 C 62

verdict manifestly inadequate or excessive should be set aside as against the evidence, 102 C 144

Supreme Court reviews primarily action of trial judge upon motion; deals only incidentally with action of jury, 102 C 448

action of trial court is matter of discretion, to be set aside only in case of clear abuse, 102 C 448

lessened value of dollar to be considered, 102 C 454

damages in personal injury case cannot be fixed mathematically or by precise rule, 104 C 300

—they are peculiarly in the province of trial court and verdicts can be set aside only where plainly excessive, 104 C 300

jury far better able to determine amount of damages for personal injury than appellate court, 104 C 509

—verdict to be set aside only upon considerations of most persuasive character, 104 C 509

defendant cannot complain that plaintiff's verdict is too small under the evidence, 105 C 367, 410

if erroneous evidence of damage could not substantially affect amount of verdict, it will not be set aside, 106 C 127

that verdict was result of compromise not ground to set it aside as inadequate, 106 C 330

where attack is really because verdict is excessive, motion should apprise opposing party of this, 109 C 485

—then only relevant parts of testimony should be printed, 109 C 485

where inadequacy of verdict shocks the sense of justice it should be set aside, 109 C 526

verdict where jury has fixed damages and trial judge has refused to set it aside will not be disturbed as excessive save for compelling reasons, 109 C 707

verdict for nominal damages will not be set aside where plaintiff not entitled to recover, 112 C 228

—nor one for inadequate damages where plaintiff does not complain, 112 C 228

damages for personal injury cannot be precisely fixed and matter is peculiarly for jury, 113 C 525

—verdict will not be set aside unless it appears plainly excessive and exorbitant, 113 C 525

to set aside verdict as excessive, amount must convince the mind that it is unjust and disproportionate to the injury, 114 C 655

even though damages awarded are inadequate, plaintiff's verdict should not for that reason be set aside if he was not entitled on evidence to recover at all, 116 C 102

judgment cannot be set aside for excessive damages unless it appears that trial court unreasonably exercised discretion, 117 C 108

since there was new trial ordered because verdict was against evidence, Supreme Court did not consider whether or not it was excessive, 122 C 304

value of comparison with amounts of verdicts in other cases, impaired by ever-present lack of complete identity of facts and circumstances, 123 C 300

—also by changes in economic considerations such as decrease in value of dollar as unit of compensation in unliquidated damages, 123 C 300

verdict of damages for death not to be disturbed for difference in judgment between jurors, even if considerable, 123 C 302

when award is made by court there is not same need as in jury case to scrutinize it to see if it was result of emotion rather than judgment, 123 C 308

not much help to be obtained from other cases in determining fairness of amount of verdict, 123 C 310, 124 C 403

to overthrow award of damages assessed by a judge, defendant must show that it was so excessive as to be one that trial court could not reasonably make, 125 C 366

plaintiff entitled to recover full compensation for all damage proximately resulting from negligence, though injuries more serious than normal because of pre-existing physical or nervous conditions, 126 C 644

practical test is whether verdict is so far from fair and reasonable compensation as to shock sense of justice, 127 C 467

§ 20. —Particular Cases

in libel and slander, reasons for interfering with damages must be obvious, 20 C 243

plaintiff's verdict in breach of promise rarely set aside for excessiveness of damages, 20 C 509

—jury a peculiarly appropriate tribunal for ascertaining the damages, 26 C 405

new trial granted for excessive damages for slander, 50 C 583

no definite measure possible where injury is by vicious bull; sound judgment must be used; \$600 *held* not excessive, 79 C 266

verdict of \$4000 in favor of father eighty-seven years old for death of son who contributed \$10 a month, set aside, 83 C 278

in slander case *held* that verdict of \$4000 should have been set aside, 85 C 24

verdict of \$5000 for death of healthy man twenty-eight years old not excessive, 85 C 112

verdict of \$500 in malicious prosecution not set aside as excessive, 86 C 249

verdict of \$168 for farm rent not set aside as excessive, 87 C 168

appeal in slander, on ground that verdict was excessive, does not raise question of privileged communication, 87 C 220

in automobile accident, damages are for the jury, 87 C 260

verdict of \$3000 for serious injury to head valid, 88 C 640

amount recoverable for death frequently depends on loss of earning power; based on economic, not sentimental value, 90 C 35

—although the limit is \$10,000, a verdict of \$1750 not set aside unless it is so inadequate as to indicate that the jury were influenced by improper considerations, 90 C 35

verdict of \$300 not excessive for severe bruises, broken nose, etc., 92 C 93

verdict for a sum equal to plaintiff's claim does not justify holding that jury disregarded an instruction to deduct a specific item, 94 C 613

no known standard by which it can be said \$10,000 is excessive for death, 95 C 112

verdict of \$10,000 *held* not excessive in case of young woman, mother of two children, bodily and mentally well, who suffered physical pain before she died from injuries, 95 C 112

verdict of \$4208 for alienation of affections not excessive, 95 C 556

verdict of \$9000, including \$3000 for special damages for fall on sidewalk, not excessive, 95 C 574

verdict of \$16,000 for personal injury to physician whose earning power was reduced from \$2000 to \$500 a year upheld, 96 C 2

jury's conclusion as to damages for permanent disfigurement of young girl, sustained, 96 C 31

verdict of \$25,000, where plaintiff had become a helpless invalid for life, not excessive, 96 C 584

verdict for \$10,000 for collision at night where evidence is conflicting upheld, 97 C 152

verdict for \$5000 upheld in highway collision, 97 C 283

conclusion of trial court that in view of claim of punitive damages it could not hold verdict excessive upheld, where not unreasonable, 99 C 242

jury to determine amount of damages recoverable for death, 99 C 657

—verdict of \$6179 upheld as not excessive, 99 C 657

verdict of \$10,000 for personal injuries upheld as not excessive, 100 C 13

damages of \$10,000 reduced by remittitur to \$7500 *held* not excessive for permanent injury to hand of child, 100 C 49

—damages for such a personal injury are peculiarly in province of jury, 100 C 49

—circumstance that jury and court saw hand given weight, 100 C 54

verdict of \$400 for defendant in replevin of \$1000 worth of furniture, excessive, 100 C 96

verdict of \$9500 reduced by remittitur to \$7500 *held* not excessive for permanent partial loss of function of leg by woman, 101 C 62

verdict of \$500 to a boy for a very serious injury set aside as inadequate, 102 C 144

verdict of \$5000 for libel, reduced by remittitur to \$2500 upheld, 102 C 448

value of life of two and one-half year old child; verdict of \$5000 not excessive, 102 C 567

breach of contract by bailee to repair fur coat; verdict of \$466 in action for trover not excessive, 103 C 685

verdict of \$4000 for personal injuries resulting from fall on icy sidewalk not excessive, 104 C 334

verdict of \$8896 not excessive in view of serious and painful character of plaintiff's injuries, 104 C 509

where plaintiff, injured by dog, sustained fractured hip with permanent effects, verdict of \$2500 not excessive, 105 C 88

in action for abuse of process, verdict of \$6000 *held* excessive; properly reduced to \$750 by trial court, 105 C 177

damages to parent by loss of earnings of young son permanently injured a matter of judgment for the trial court not readily disturbed, 106 C 312

in death case, conclusion of jury can rarely be upset on ground that damages were excessive or inadequate, 106 C 329

§ 20 Verdict

- error to set aside verdict for \$1000 as inadequate, 106 C 329
- verdict of \$2000 in personal injury case not excessive, 107 C 23
- verdict of \$2000 for personal injuries, even as reduced to \$1500 excessive, 107 C 27
- failure to set aside verdict for about 30 per cent of special damages jury might have found, where very serious injuries were suffered, erroneous, 109 C 526
- amount of verdict in action for failure to pay for services and materials, supported by evidence, 110 C 381
- verdict of \$4200 for 25 per cent permanent disability for seventy-year-old plaintiff where special damages were \$2315, not excessive, 111 C 718
- where in personal injury case verdict was only for expenses, with nothing for injury and suffering, it was set aside as inadequate, 112 C 228
- reason is that expense to State, burden on court and fact that plaintiff has failed to prove basis of recovery does not justify further proceedings, 112 C 228
- verdict of \$1000, representing practically nothing for pain and suffering and compensation for death, inadequate, 113 C 405
- verdict of \$8000 for fractured shoulder and serious nerve injury *held* not excessive under circumstances, 113 C 457
- cannot be assumed that jury was overborne by sympathy aroused from plaintiff's emotion on stand, 113 C 462
- verdict of \$4000 for boy's broken leg resulting in permanent shortening not excessive, 113 C 522
- where net value of properties to be exchanged was equal, verdict awarding substantial damages for defendant's failure to exchange as agreed was excessive, 113 C 535
- verdicts of \$3250 and \$4250 in actions for libel against newspaper, upheld, 113 C 574
- verdicts in this type of case rest largely in discretion of jury, 113 C 582
- verdict of \$15,000 for personal injury sustained where special damages of \$3000 and permanent crippling of ankle and foot, with impairment of future earning capacity was proven, sustained, 113 C 782
- verdict for \$2500 not excessive where jury might have found miscarriage resulted from injury, 114 C 36
- verdict of \$9000 not excessive and causal connection between injuries and accident established, 114 C 64
- reasonable basis on which jury could find probable profits in amount of verdict, 114 C 190
- verdict of \$15,000 for injuries to nose and in sacroiliac region, upheld, 114 C 376
- expense of operations in plastic surgery included, 114 C 376
- verdict of \$5000 upheld where woman was seriously burned by gasoline catching fire while tank of car was being filled, 114 C 396
- verdict of \$3500 in suit for alienation of affections upheld, 114 C 479
- hemorrhages caused by accident; verdict not excessive, 114 C 652
- verdict for \$17,000 with remittitur of \$3000 upheld in personal injury case, 114 C 701
- \$7500 reduced to \$5000 for death of twelve-year-old boy in good health not excessive, 115 C 62
- damages for loss of services of minor child incapable of definite ascertainment and must ordinarily be left to judgment of jury, 115 C 107
- verdict of \$5000 more than one-half of which was special damages, upheld, 115 C 110
- verdict of \$4000 including \$555 special damages for injury to boy not excessive upon evidence, 115 C 457
- verdict of \$6000 in case involving fracture of thigh and permanent shortening of leg not excessive, 115 C 709
- verdict in slander action for \$3000 in which remittitur of \$1800 was filed, not excessive, 115 C 718
- plaintiffs properly awarded damages for washing of dirt onto their land by defendant so they could not utilize it for garden; \$250 not excessive, 115 C 721
- plaintiff in addition to special damages and severe immediate injuries suffered brain injury which will get progressively worse; verdict of \$15,000 not excessive, 116 C 18
- award of \$625 inadequate where plaintiff's injuries were severe, causing prolonged suffering and probable permanent disability, 116 C 102
- plaintiff earned \$21 to \$25 per week pressing clothes and permanent loss of part of two fingers would seriously interfere with occupation; verdict of \$7500 not excessive, 116 C 292
- verdict of \$2000 for injuries to young woman including permanent scars not so excessive that court should have set it aside on failure of plaintiff to file remittitur of \$1000, 116 C 702
- verdict for \$15,000 for injuries to plaintiff struck by defendant's automobile sustained, 117 C 343
- \$900 for injury producing twitching of eyes, dizziness, etc., which expert testified would be permanent, and which had been unchanged for five months before trial, properly *held* adequate, 117 C 673
- judgment of trial court, which saw plaintiff, entitled to great weight, 117 C 673

verdict of \$1500 not so clearly unwarranted, on conflicting evidence, as to justify interference, 118 C 463

\$5000 held not excessive where there were permanent injuries though special damages only \$200 and plaintiff returned to work in few weeks at wages as high as before, 118 C 565

injuries to sacroiliac joint, nervous shock, return of arthritis to nurse earning \$42 a week; \$7500 not excessive, 118 C 690

verdict of \$700, where plaintiff had to hire son for seven weeks at \$25 and eight weeks for \$4, plus other special damage and personal injuries, justified, 118 C 701

verdict of \$9000 for personal injuries, though it was disputed if plaintiff's condition was wholly due to accident, not palpably erroneous, 119 C 483

verdict for personal injuries, though liberal, not so unwarranted as to justify interference, 120 C 114

verdict of \$4200 for woman whose arthritis was lighted up, causing pain and stiffness in neck, headaches and nervousness, which might continue indefinitely, not excessive, 120 C 692

arm amputated; earnings \$19 a week; life expectancy thirty-two years; \$15,000 sustained, 121 C 480

verdict of \$15,000 for injury to dentist who suffered two fractures of skull necessitating trephining operation with substantial medical bills and loss of income and 10 to 20 per cent permanent incapacity sustained, 122 C 371

verdict for \$1000 could not be sustained in absence of evidence from which jury could find that plaintiff's fall on bus caused diabetic upset, 122 C 375

damages for death of child who was daughter of dentist, while large, were not excessive, 123 C 114

verdict of \$7500 for death of normal child of three, without conscious suffering, sustained, 123 C 300

—problem of estimating value of child's life to estate of great difficulty and solution left to trier's good judgment, 123 C 300

pain and suffering; amount of damages awarded (by court) found not excessive, 123 C 689

verdict of \$3000 for plaintiff, sixty-eight, sacroiliac sprain, lameness and pain, condition permanent and will grow progressively worse; not excessive, 124 C 88

verdict of \$1500 for broken arm, seven weeks in hospital, special damages of \$800, and no permanent injury, not so small as to indicate that sympathy influenced verdict rather than liability, 124 C 403

\$23,500 judgment in personal injury case tried to court though large, not so unreasonable as to be excessive, 125 C 366

while jury liberal in assessment of damages, verdicts could not be held unwarranted by evidence, 126 C 247

law furnishes no precise rule for assessment of general damages; \$2800 for knee injury sustained, 126 C 360

for \$100 not excessive, where plaintiff vomited repeatedly, was made nervous, was treated eight times by doctor and had to put her baby on bottle, 127 C 228

compensation for time lost, peculiarly for jury after consideration of plaintiff, medical testimony, time of disability, rate of wage and opportunity for employment, 127 C 464

\$100 for injuries serious enough to keep plaintiff from work for two months, inadequate, 127 C 466

for \$6625 when special damages were \$5098 and further loss of wages of \$1500 in prospect, inadequate, 128 C 56

for \$3000 for services rendered deceased, excessive, 128 C 405

award by court of \$7000 damages where injuries included 35 per cent disability in knee, loss of earnings and reduction of future earning capacity, not excessive, 128 C 470

award by court of \$700 damages not excessive, 128 C 679

for \$25,000 sustained, in view of serious injuries, extreme suffering and permanent insanity of twenty-year-old plaintiff, 129 C 118

damages in "swinging door" case not so excessive as to require interference, 129 C 159

damages of \$1800 for dog bite, while large, could not be held excessive, 129 C 208

§ 21. —Remittitur

remittance of too great damages must be made at the same term, 4 C 309

new trial will be granted unless excess above legal amount be remitted, 12 C 473

where general verdict is given on two counts and recovery can be had on only one, 69 C 652

court ordered remittitur where damages were increased by reason of instructions given in sending jury back, 71 C 1

remittitur and amendment of judgment where damages given in excess of those claimed, 75 C 255

judgment for new trial unless part of damages are remitted upheld, 78 C 296, 86 C 319

order by trial court for new trial in replevin, unless erroneous part of judgment be surrendered, 81 C 101

§ 21 Verdict

motion in trial court to set aside verdict denied on condition of remittitur, 82 C 171

plaintiff can remit amount of verdict in excess of sum claimed, 82 C 615

an entire verdict that is excessive may be set aside if a part is not remitted, 83 C 278, 85 C 24, 611, 86 C 319

in verdict of \$4000 for slander, remittitur of \$1500 or new trial ordered, 85 C 23

verdict of \$2500 ordered be set aside unless remittitur of \$900 filed, upheld, 85 C 611

where case was three times tried, court conditioned new trial on remittitur, 87 C 685

if refused, too late to offer to accept it, if decision on appeal is adverse, 89 C 712

if breach occurred a month earlier than time indicated in verdict, and therefore damages were too large, verdict should be set aside unless remittitur is filed, 93 C 123

verdict of \$12,650 for personal injury in which both of plaintiff's legs were broken, but where he was earning more at the time of the trial than at the time of the injury set aside unless \$5000 remitted, 96 C 334

practice of ordering new trial unless part of judgment erroneously included is remitted approved, 96 C 342

where damages to automobile truck practically conceded but there was error as to claimed loss of use, Supreme Court directed new trial unless excess over former item remitted, 98 C 610

refusal to file remittitur; verdict *held* to have been properly set aside, 99 C 729

court ordered new trial unless plaintiff remitted item of damages based upon too vague testimony, 103 C 597

where court, overlooking conflict of testimony charged jury erroneously as to time plaintiff was out of employment, remittitur ordered to make verdict correspond with defendant's claim, 107 C 568

damages of \$10,000 too high in personal injury case and remittitur of \$2500 directed by Supreme Court, 111 C 102

right of Supreme Court to order remittitur; purpose of, 111 C 575

judgments for \$20,000 for criminal conversation and \$26,025 for malicious prosecution *held* excessive, 111 C 575

—remittitur of \$10,000 in first case and \$22,000 in second ordered by Supreme Court, 111 C 575

verdict of \$5848 for injuries with no impairment of earning power *held* excessive and remittitur of \$1000 ordered by Supreme Court, 115 C 728

verdict of \$5863 for injuries including 10 per cent permanent disability of wrist and knee and special damages of \$1150 *held* ex-

cessive and remittitur of \$1000 ordered by Supreme Court, 115 C 728

\$1800 awarded by trial court for scar which could be relieved by \$200 operation excessive; new trial ordered unless plaintiff file remittitur of \$1000, 117 C 103

alienation of affections; where Statute of Limitations allowed damages only from 1926 and at that time value of consortium was almost wholly destroyed, verdict of \$8000 excessive and remittitur of \$4000 justified, 118 C 699

trial court has the right to condition the acceptance of the verdict upon a remittitur of part of damages, 118 C 700

jury gave plaintiff verdict for \$30,000 which court refused to accept, believing jury aroused by fact that defendant was intoxicated; second verdict for \$18,000 set aside by Supreme Court unless plaintiff remitted \$3000, 121 C 545

amount paid for a release which is unsuccessfully set up as defense should be credited on verdict; remittitur proper, 122 C 435

whether court will grant new trial conditioned upon failure to file remittitur or will set aside verdict unconditionally, rests in its discretion, 126 C 569

setting aside verdicts of \$3500 and \$4100 in personal injury cases unless remittiturs of \$1275 and \$2027 should be filed, *held* erroneous on facts, 126 C 644

Supreme Court reduced judgment of trial court from \$5825 to \$3825, 128 C 300

where action for damages tried to court, award will be disturbed only if so excessive as to be unreasonable, 128 C 302

judgment cannot be directed by appellate court on ground of excessive verdict without giving plaintiff option of filing remittitur or having new trial, (dis.) 128 C 303

—reasoning applied where constitutional right to jury trial not involved, (dis.) 128 C 303

—English rule requires consent of defendant to filing of remittitur, (dis.) 128 C 304

special damages found to be \$1650, additional recovery for personal injuries of \$10,350 found excessive, and remittitur of \$2000 ordered, 129 C 203

in ordering remittitur fair appraisal of compensatory damages and not limit of legitimate generosity should be rule; additional remittitur ordered by Supreme Court, 129 C 585

—where there could be no reasonable conclusion other than that damages amounted at least to those so fixed, there is no invasion of proper function of jury, 129 C 590

VESTED REMAINDERS

See WILLS § 42

VESTED RIGHTS

See also WILLS §§ 37, 42, 43

a designated beneficiary has no vested right to a benefit fund in a beneficial association during the life of a member, and no lien for assessments and dues paid by him, 82 C 315, 87 C 644, 90 C 511

property rights judicially declared and passed upon are vested, and may not be disturbed by future legislation, 83 C 346, 369

benefit association cannot pass a law which will divest, impair, or disturb rights once vested in a member, 84 C 96

no vested right to an appeal, 86 C 425

validating acts as to tax liens not void as impairing vested rights, 90 C 312

representative of a deceased designated beneficiary of a benefit association can collect, 90 C 511

by interpleading, a benefit association acknowledges liability to one of two beneficiaries, but does not affect vested rights of either, 91 C 115

interest in abandoned highway not vested until after expiration of eight months, 93 C 374

covenant to reconvey property, and not to sell until six months after one had a chance to buy, puts off vesting of property beyond lifetime of persons in being and twenty-one years, and is invalid, 93 C 518

vested estate not forfeited by breach of a condition subsequent the performance of which has become impossible by law, 96 C 182

—effect of Volstead Act on a saloon lease, 96 C 182

though under retirement act person eligible has not vested right even when he has contributed to fund, that does not mean that charter provision may be overridden by municipal board to deprive him of pension, 129 C 419

VETERANS

See MILITARY

VEXATIOUS SUIT

See MALICIOUS PROSECUTION

VIEWING THE PREMISES

See TRIAL § 4

VOLUNTARY ASSOCIATIONS

§ 1. IN GENERAL 2. MEMBERSHIP

See also BENEFICIARY ASSOCIATIONS; CHURCH AND ECCLESIASTICAL SOCIETIES; CORPORATIONS

§ 1. In General

devise to, for public charity, will not be allowed to fail for want of devisee then capable of taking legal estate, 17 C 188

holds property by its members as individuals, 19 C 164

militia company under voluntary enlistment is a voluntary association; may be sued by its distinguishing name, 36 C 382

—is liable for rent of armory, though commander had received rent money from State and applied it to other company purposes, 36 C 383

cannot hold legal title to land, 44 C 260

statutes do not remove the individual liability of members, 55 C 113

—optional with creditor to sue either association or its members, but if former,

§ 1 Voluntary Associations

- plaintiff can levy only on its property, 55 C 113
- record of acts of association not necessary to their validity; evidence outside record as to amendment of by-laws, 71 C 719
- liability of president for libelous article published at order of association, 72 C 51
- combination of manufacturers for proper purpose lawful; may adopt by-laws, provide fines for their breach, etc., 88 C 332
- voluntary association is merged into a corporate body by incorporation, 89 C 616
- formation of a corporation without capital stock by three who are members of a voluntary association does not merge it without assent of association or its members, 89 C 616
- necessary steps to constitute merger, 89 C 616
- local branches of a voluntary association cannot agree to merge if the supreme authority is lodged in a convention of the supreme officers, 89 C 616
- how property vested where local lodge charter is revoked by Grand Lodge, 97 C 238
- association organized to fight fires and receiving annual appropriation from town is not a municipal corporation, 118 C 307
- is not entitled to immunity granted such corporations for negligence in performance of governmental functions, 118 C 307
- rule does not apply to negligence of servants of association and driver of fire truck is liable for his own negligence, though employed by association, 118 C 307
- where employees of brokerage company formed association, the funds of which were to be invested by company, and when it became financially weak all members except two signed waivers authorizing company to use funds and waiving all rights to them, *held* in bankruptcy of company that association had claim against estate for fund, 118 C 521
- all members entitled to participate in proceeds and two who did not sign waiver had no preference, 118 C 521
- where association is organized for certain purpose, donation of funds to another purpose would be *ultra vires*, 118 C 524
- association would have no right to do this without consent of every member, 118 C 524
- one participating in illegal act and receiving funds would be bound to restore them, but trustee of fund and party receiving it could set up estoppel against members of association participating in act, 118 C 524
- association organized under statute as co-operative marketing corporation and exercising powers granted to it, not open to

attack as against public policy of State, 122 C 482

where statute provides that “presiding officer” of voluntary association should be served, service on vice president not sufficient, 125 C 490

§ 2. Membership

- members of voluntary association are not personally liable, 16 C 516
- member abandoning association abandons interest in its property, 19 C 167
- co-operative association; relation of members to manager, 55 C 112
- decisions of voluntary associations admitting, disciplining, suspending and expelling members are quasi-judicial, 58 C 557
- courts will only interfere to ascertain whether proceedings were pursuant to the rules of the association, were in good faith, and not in violation of the laws of the land, 58 C 557
- decision of grand master *held* final, 58 C 557
- reversal of suspension restored membership from date of suspension, it making no difference that reversal was after death of member, 58 C 558
- where a decision of a grand master is made final by the rules, evidence will not be received on that point, 58 C 558
- where usage exists to refer question of membership to officers, a contract of insurance *held* to be made in view of this, 58 C 556
- the contract to be construed as though such reference was provided in terms, 58 C 557
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- one seeking injunction against suspension by an officer of masonic lodge must first exhaust the remedies provided by its rules, there being no property rights involved, 62 C 589
- immaterial that suspending officer was both complainant and judge, 62 C 591
- whether the above rule applies where property rights are involved, *quaere*, 62 C 593
- regular payment and receipt of monthly dues for sixteen months *held* waiver by mutual benefit society of condition of annual dues, though these were payable at end of year, without any demand, 63 C 174
- liability of members; manager of polo team as member of association supporting it, 71 C 613
- expulsion of member at irregular meeting ratified; liability of association; damages; remedy by mandamus, 76 C 651

by-law compelling exhaustion of means of redress in association before resort to courts upheld, 78 C 43

—indebtedness to association as destroying good standing, though arising out of lottery, 78 C 43

fact that benefit association was for some months a voluntary association does not prevent it from protecting members of the order, 81 C 190

resignation of member takes effect when tendered under the rules, 88 C 332

where formed to engage in business and make profits, its members are liable as partners to third persons on contracts which are within its scope and are entered into with actual or apparent authority, and a joint judgment against them is justified, 119 C 681

—when member cannot obtain reimbursement from it for liabilities he has discharged, he is entitled to contribution from all other members, 119 C 681

—but when purpose is not business or profit, liability of members not in nature of partners but of principal and agent, and only those members who authorize or ratify obligation are liable on account of it, 119 C 681

—person may authorize obligation by becoming or remaining member knowing that such contract would be proper or if contract is outside scope of purposes, by as-

senting to it or participating in undertaking, 119 C 681

—actions for contribution based on principle that where one is compelled to pay money which others are equally bound to pay, each of latter should contribute his proportion, 119 C 681

—as between members of nonprofit unincorporated association, each is bound to contribute only aliquot share, 119 C 681

—in present case plaintiffs should recover of each participating defendant his aliquot share of entire amount expended to take up note of lodge on which they were indorsers, 119 C 681

—amount arrived at by dividing net amount paid by number of participating members including plaintiffs, 119 C 681

—and nonjoinder in action of other participating members not a defect, as computation based on number potentially liable, and defendants not prejudiced by absence as parties of others similarly situated, 119 C 681

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—members who entered into contract with it cannot attack it as not within the scope of corporate powers, 122 C 494

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one who voluntarily pays another's taxes not subrogated to remedies for collection of taxes, 75 C 370, 76 C 26

mere voluntary payment of debt by third party gives no right which equity can recognize, 93 C 119

mere volunteer may not, at law or in equity, recover expenditures made in defending the interest of another, 93 C 590

—life annuitants whose interests are not jeopardized, not reimbursed for expenses in defending fund from excessive charges, 93 C 590

workman who voluntarily does services for an officer of the company, for which he gets tips, does not come under Workmen's Compensation Act, 94 C 487

one taxpayer cannot take part in collection of taxes against another taxpayer, 95 C 312

—such duties must be performed by authorized agencies, not by volunteers, 95 C 312

one who, without assent of the master and without legal justification, unnecessarily assists a servant in performance of master's services is a volunteer, 95 C 568

where two own tobacco jointly, sell it to L, who pays half price to each, but later finds he is entitled to refund, and one owner pays whole refund, he is not a volunteer so as to prevent recovery of half of it from other, 96 C 642

voluntary settlement with employee by third party does not prove his legal liability, which is condition precedent to employer's right to reimbursement for compensation payments, 101 C 200

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relator in mandamus to enforce public duty is a mere volunteer and is not entitled to costs directly or by subrogation or contribution, 112 C 666

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WAIVER

- § 1. IN GENERAL
- 2. IN LEGAL PROCEEDINGS
- 3. —In General
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- 6. CONTRACTS; SALES
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defect in transfer of case from Superior Court in one county to Superior Court in another goes to venue, not jurisdiction, and is waived if point not raised in trial court, 108 C 74

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plaintiff's mother bringing action as next friend waived her right to recover hospital expenses in his favor, 115 C 457

where defendant cited in to answer cross-complaint submits disposition of case to court without objection he cannot, after judgment against him, be heard to say that the court had no power to deal with controversy, 115 C 619

jurisdiction to entertain particular proceeding cannot be conferred by waiver or consent, 115 C 678

defendant S imprisoned on body execution gave jail liberties bond which he breached; *held* S and surety waived any illegality in levy of execution and are liable on bond, 116 C 22

—even though writ of error may have effected stay of execution, 116 C 22

lack of notice to incumbrancer of condemnation of land may be waived, 116 C 601

—*held* waived where award was not disputed or any informality in proceedings claimed, 116 C 601

remedy will not be enforced where it would be unjust because party has by conduct waived it, or has put other party in situation which would not be reasonable if remedy were asserted, 116 C 630

record *held* to disclose no act or omission which could be regarded as constituting consent to late filing of judgment, waiver thereof, or estoppel to take advantage of the error, 117 C 639

by filing claims and description of land during winter session, parties waived right to claim that case, tried in fall session, must be decided before close of winter session, (dis.) 117 C 650

where assignee sues in his own name without making assignor party and case is tried without objection by defendant, latter waives any defect, 120 C 274

lack of jurisdiction over person may be waived and is waived by general appearance, 121 C 380

where plaintiff moved restoration of case to docket at term subsequent to its withdrawal defendant, by contesting motion on its merits, waived any lack of jurisdiction on part of court, but did not waive right to

claim action of court in granting motion erroneous, 123 C 166
 circumstantial defects in proceedings can be waived if no appeal taken from judgment, 123 C 377

failure to give notice to attaching officer of application to dissolve attachment of real estate waived by failure to appeal from order of dissolution, 123 C 377

where two weeks after late entry of deficiency judgment defendant secured extension of time to appeal from it and thereafter made motion to vacate it, it could not be held as matter of law that he had waived right to object, 123 C 581

Statute of Frauds as defense may be waived, 124 C 506

where defendant's counsel, who appeared specially for purpose of plea in abatement, after it was overruled appeared generally, *held* no waiver of right to pursue appeal from the ruling with an appeal from the judgment finally rendered, 125 C 491

plaintiff did not waive right to bring action for declaratory judgment by previously seeking permission from zoning authority to alter building, 127 C 409

where, in decision on motion to erase, court left open question of improper joinder of appeals and pointed out proper procedure for determination, matter was waived when party did nothing about it, 128 C 696

where statute provides that no judgment for strict foreclosure shall be reopened after title becomes absolute in incumbrancer, reopening of judgment after that time is erroneous in absence of waiver, 128 C 697

§ 4. —Matters Occurring During Trial

right to renew new trial not lost by abandonment at trial of claim under which evidence was excluded, 44 C 486

party having remedy on warranty, and also for fraud, electing to pursue one *held* to waive the other, 49 C 332

failure of accused to request separate verdict waives all objections to general verdict, 54 C 89

failing to object to evidence as to purchase by agent under allegation of purchase by principal waives defect, 66 C 155

where, on trial, issue was made as to performance of contract, party cannot later base claim on failure of architect to approve, under terms of contract, 69 C 228

treating original file as record on appeal from justice court waived by failure to object, 77 C 136

irregularity in procedure in trial court waived by failure to object; sufficiency of defense determined on motion to prevent defendant's use of it, 77 C 284

failure to object to giving interrogatories to jury as waiver, 79 C 79, 80 C 549

failure to object to improper argument as waiver, 81 C 22, 83 C 161, 183, 86 C 415

right to urge objection to variance is waived by failing to object to evidence or making motion to strike it out, 83 C 635

right to object to verdict because of improper conduct of attorney waived by not objecting in time, 83 C 702

counsel's statement that no claim is made that crime is less than murder not a waiver of accused's right to have jury pass on it, 87 C 286

objection to evidence is waived when objector later admits the facts, 89 C 322

under denial of defense of trespass, defendant should object to proof of license at time of trial; otherwise he waives this objection, 91 C 492

failure to call court's attention to juror's misbehavior at the time is a waiver of the right, 92 C 155

waiver by failure to make timely objection to improper remarks of counsel, 96 C 289
 in criminal case, though accused waived right to object to admission of a statement, he still can show a contradictory statement, 96 C 428

objection to improper argument made after verdict too late, 96 C 584

to proceed to try case, after objection that trial has been continued beyond time allowed by law has been overruled, is not a waiver, 97 C 554

of variance by failing to object on trial on the merits, 98 C 571

appellee waives adverse rulings unless he files bill of exceptions, 101 C 579

of cause for disqualification of juror, 103 C 537

accused waives defects in drawing of jury panel by subsequent election of court trial, 105 C 326

failure at continued hearing to proceed with cross-examination of plaintiff, interrupted at first hearing, as waiving right to it, 107 C 383

insurer does not waive defense of nonliability for loss under liability insurance policy by participating in defense of action, where it gave notice that it did not waive this claim, 107 C 446

waiver of right to claim construction of contract by not making it at trial, 108 C 126

waiver of want of notice of appointment of permanent receiver by failure to make timely objection, 111 C 606

where court did not rule on admission of evidence of regulation of public utilities commission but reserved right to comment on it in charge, acquiescence in ruling as

§ 4 Waiver

waiving right to object after verdict, 113 C 414
during direct examination of defendant, her counsel asked for conference with judge, and in chambers said he was surprised with testimony and asked if he could cross-examine her, to which the plaintiff's counsel acceded; *held* latter could not claim any error, 116 C 672
allowances to appraisers and assistants; where receiver testified as to the matter but was not sworn and appellants did not object, they waived any defect, 116 C 730
party cannot on appeal claim as error defects of procedure which he expressly waived at trial, 125 C 737

§ 5. —With Respect to Pleadings

pleading over before justice after plea in abatement overruled *held* a waiver of that plea in appellate court, 29 C 520
omission to plead in higher court the pendency of a suit is no waiver of right to plead judgment of lower court in bar, 47 C 323
questions as to capacity of parties to sue must be raised by the pleadings, 52 C 233
—where not raised, such objection is waived by going to trial on merits, 52 C 233
failure to demur; defects on face of pleadings may be regarded as waived, 53 C 43
where pleadings fail to afford proper information and are capable of amendment defendant should seasonably object, 57 C 157
—cannot make such objection after evidence is in, 57 C 157
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failure to take exception to defective pleadings *held* a waiver, 61 C 1
objection to failure to plead agency waived if not claimed at trial, 66 C 155
plea in bar or admission in answer waives such defects as are reached by motion, 66 C 165, 70 C 73, 320, 73 C 83, 368, 74 C 304, 75 C 254, 77 C 382, 602, 78 C 119
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voluntary amendment after demurrer or other objection sustained waives right to claim error in ruling of court, 68 C 495, 71 C 425, 72 C 196, 217, 257, 74 C 125, 75 C 641, 79 C 79, 80 C 348, 549
party failing to ask court to limit effect of admission in pleading waives right to object, 69 C 1
defects in quo warranto waived by respondent appearing and pleading to merits, 69 C 227
by trial and consent to reservation, party is estopped to claim that issues tried were not those settled before trial, 69 C 228
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omission of formal denial to answer disregarded after trial has proceeded as though it were made, 70 C 420
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plea in bar waives repugnancy, 73 C 83
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that demurrer is too general, waived, if not objected to, 73 C 538
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general denial waives such defects as are reached by motion, 75 C 254, 77 C 382
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default and hearing waives rulings on demurrer, unless complaint is fatally defective, 77 C 501
default and hearing waives want of precision in pleadings, 78 C 48
plea in bar waives right to expunge, 78 C 99
though right to move to expunge is waived, court may expunge of its own motion, 78 C 99
amending pleading waives right to claim error in rulings on original, 79 C 79, 80 C 549
right to more specific statement waived by general denial, 80 C 335
amendable defects in criminal information, not attacked at proper time, not ground of new trial, 80 C 614
filing of substitute pleading, even after order limiting time for it, waives ruling on demurrer to original, 81 C 415, 474
where, after alleging agreement by plaintiff to furnish goods, no allegation of agreement by defendant to accept them is made,

in absence of demurrer or objection to evidence, defect disregarded, 81 C 479

defective allegations not demurred to may be aided by finding and support judgment, 82 C 567

in mandamus one may avail himself of a fact pleaded if it is not waived, 83 C 554

going to trial on general issue, after demurrer to a second defense sustained, does not waive right to have ruling on demurrer reviewed, 83 C 634

imperfect, argumentative form of statement in complaint is waived by pleading a general denial, 83 C 642

waiver of jurisdictional fact, or failure to properly allege it, 85 C 528

pleading nonperformance of contract and damages due to specific defect waives dissatisfaction with work as a whole, 88 C 619

want of precision in alleging causes of personal injury is waived by proceeding to trial; reliance on statute, 90 C 188

where one voluntarily replaces a motion demurred to, he cannot question ruling on demurrer, 90 C 261

defendant, answering to merits after unsuccessful plea to jurisdiction under penalty of being defaulted, does not waive right to contest jurisdiction, 90 C 293

motion for more specific statement should be filed before answer; if not, defects of formal nature waived, 91 C 5

in petition to public utilities commission, failure to allege in words of the statute that gas company had unreasonably refused or failed to provide service is waived, especially where the petition sufficiently informs the company of what is desired, 91 C 134

variance must be claimed on trial or it is waived, 91 C 251

counsel's consent to statement of the issue by judge at commencement of trial is waiver of right to have pleadings read, 91 C 430

on denial of defense of trespass one can prove license but this is waived by failure to object to evidence on trial, 91 C 492

contesting a case on its merits without objection to precision of complaint or evidence waives a material variance, 93 C 302

voluntarily going to trial on the merits and not moving to set aside verdict or arrest judgment waives omission of prayer for relief, 93 C 367

waiver of any question as to plaintiff's capacity to sue by failing to raise issue by plea and going to trial on the merits, 94 C 85

lack of allegation that defendant knew plaintiff did not comprehend legal consequences of her act is waived, if evidence not objected to, no demurrer or motion filed, nor mention made of it in the assignments of error, 94 C 276

defendant who does not ask for a more specific statement of damages and does not object to the evidence waives his rights, 94 C 481

waiver of right to demur by filing an answer, 96 C 394

denial of allegation as to hospital and medical attention *held* to permit proof of expenditures made, in absence of motion for more particular statement, 97 C 593

one does not waive right to appeal by pleading over after demurrer overruled, 99 C 67

party may waive requirements that adversary prove certain facts by admission in pleading or stipulation on trial, 99 C 537

going to trial and permitting evidence that "bum," used in connection with woman, meant she was lewd waives defect in complaint in failing to allege such meaning by innuendo, 99 C 717

plaintiff who pleads to cross-complaint on merits and goes to trial cannot complain of a failure to serve it on a defendant as required by rules of court, 101 C 658

unless specially pleaded, defense that beneficiary of trust commenced suit without demand and refusal of trustees to do so, is waived, 102 C 98

objection to form of counterclaim waived unless made in trial court, 102 C 152

circumstantial defects in process and pleading may be waived by stipulation or failure to object, 104 C 126

where defendant in bastardy waives preliminary examination and consents to being bound over, this is waiver of merely formal defect, 104 C 126

defect in obtaining jurisdiction not waived by answering to merits after plea to jurisdiction overruled; but otherwise, where defendant seeks affirmative relief, 104 C 206

defect in failure to specially deny execution and delivery of written instrument waived unless objection made to evidence when offered, 104 C 338

defendant who files new answer to amended complaint cannot raise questions as to motion to expunge parts of original answer to original complaint, 105 C 671

failure to object to general allegation of negligence in operation of automobile as waiver, 105 C 690

too general statement of cause of action waived by going to trial, 106 C 41

—so misjoinder of causes of action in one count, 106 C 41

statement by counsel that no claim is made on second count is equivalent to withdrawal, 107 C 380

facts not within issues will not support judgment and defect not waived by failure to object, 107 C 484

§ 5 Waiver

—but this not so if facts within general allegations of complaint, though not in specific statement filed, 107 C 484

—too general statement of cause of action waived by going to trial without objection, 107 C 488

—also admission of improper evidence, 107 C 488

question of jurisdiction may be raised at any time; not waived by answering on merits after demurrer to plea to jurisdiction sustained, 107 C 545

variance in charging one as instigator of malicious prosecution whereas he was only aider and abettor waived by trial on merits without objection, 108 C 40

claimed construction of contract waived by contrary allegation in pleading, 108 C 126

failure to plead accord and satisfaction specially regarded as waived where case tried as though it were, 108 C 469

governmental immunity by city under general denial; if litigated without objection from plaintiff he cannot on appeal claim it was not properly raised, 108 C 622

failure to object to evidence on ground pleadings do not set up family car doctrine waives question, 109 C 417

variance between amount proved as selling price of property and amount alleged waived, if no objection made to evidence and defendant not prejudiced, 109 C 589

where general denial filed without demurrer, question that there is no statutory authority for action comes too late, 114 C 575

opening of judgment of foreclosure after title has vested in incumbrancer contrary to statute is waived if plaintiff files substitute complaint, 115 C 619

—is not waived in absence of attempt thereafter by plaintiff to secure affirmative relief, 115 C 623

where complaint contained allegations justifying bringing action within one year after failure of previous action and demurrer to these allegations was sustained, failure to plead to answer to cause of action thereafter filed does not waive right to appeal from demurrer, 116 C 31

where court charged in accordance with the request of party he cannot, after verdict rendered, raise objection upon ground that complaint did not afford basis for recovery, 117 C 165

conditional vendee did not waive compliance with provision that on repossession after default vendor should sell car and apply proceeds on note, either in pleadings or in failing to object to evidence, 117 C 251

misjoinder waived by failure to object seasonably and in manner provided by rule, 118 C 162

variance in complaint and proof waived by failure to object to evidence, 118 C 610

claim of lack of jurisdiction waived by defendant's filing counterclaim, 120 C 111

where no claim made until after trial that complaint did not claim alternative relief against either of two defendants but did allege facts appropriate to recovery against either, defect *held* waived, 120 C 140

filing answer waives right to question legal sufficiency of complaint by demurrer, 121 C 77

plaintiff cannot take advantage of a circumstantial defect in plea in abatement after filing denial and contesting issue, 121 C 343

where plaintiff replies to plea of release that it was secured by fraud and no objection by pleading or otherwise is made based on failure of plaintiff to tender or return consideration received, necessity for tender is waived, 122 C 429

allegation that L was acting as defendant's agent not waiver of plaintiff's right to rely on statute de presumption of agency, 123 C 460

where defendants all in court were apprised of claim and were or should have been prepared to make proper defense, absence of specific allegation that they were partners waived, 124 C 500

failure to make motion to separate waived claim that each bet constituted separate cause of action, in suit for recovery of money lost in gambling, 125 C 113

by plaintiff by pleading due care on part of intestate of statutory requirement that burden of pleading and proving contributory negligence on defendant, 126 C 396

lack of jurisdiction may be waived and parties may, by consent, enlarge scope of litigation to include issues not raised by pleadings, 128 C 121

§ 6. Contracts; Sales

performance of condition in bond *held* waived by subsequent written agreement, 2 R 347

what constitutes waiver of breach of condition in a deed, 1 C 79

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a contract broken cannot be waived, though it may be released, 5 C 383

no waiver of remedy on conditional subscription by forbearance to sue, 9 C 508

discharge of guaranty *held* waived by new promise, 34 C 37

agreement as to time *held* waived by what acts of defendant, 37 C 570

right to specific performance *held* not waived by presentation of claim for amount paid against estate, 38 C 413

law presumes that knowledge of a fact which may terminate a contract continues thereafter in the minds of a party, 56 C 128

—party must exercise or waive the right of termination, 56 C 129

where party was under no obligation to possess knowledge of violations of agreement *held* no basis for waiver, 57 C 387

acceptance of payment under one condition of a sale *held* not, as matter of law, a waiver of other conditions, 57 C 392

consent and attempt of wife to execute a deed under an agreement to reconvey at request *held* a waiver of formal request, 59 C 117

waiver of conditions of contract; fact that one party has failed to comply with them is not evidence of intention to waive by other party benefited, 59 C 551

refusal of any payment as waiving demand of precise amount due, 71 C 207

defects in article sold on approval waived by acceptance, 75 C 467

if one accepts and pays for ice at a higher rate than required by original contract, he waives provisions of contract, 81 C 479

oral direction to contractor to do extra work is a waiver of requirement of a written order, 82 C 280

one cannot have damages for nonperformance of conditions waived by him, 82 C 427

provision for completing building on certain date can be waived; completion then must be within reasonable time, 82 C 428

waiver of fraud by conduct, 82 C 643

accepting money after time set in contract as waiving strict compliance with it, 87 C 294

waiver by owner of a building, of a contract clause making decision of architect final, 89 C 172

waiver of right to rescind contract for fraud; question of law and fact, 90 C 624

as to an agreement that it shall not be used as evidence of admission or waiver in regard to terms of an earlier agreement, 90 C 669

payment of money due on a building contract and occupancy not necessarily a waiver of defects, 91 C 657

failure to require partial payments at time fixed by the contract is a waiver, but after notice resumption of payments at proper time can be required, 92 C 693

mere acceptance of goods *held* not to waive claim for damages, 94 C 311

indorser of note who has not received notice of dishonor waives right of immunity by promise to pay, though he does not know note was ever presented, 94 C 495

broker does not waive right to agreed commission by failing to reply to statement of seller, after commission was earned, that he be paid a lesser sum, 95 C 448

effect of payments made after discovery of fraud as waiver; to constitute waiver, it must clearly appear when fraud was discovered, 100 C 394

party to contract cannot waive performance of condition precedent required of him though designed in his favor, 102 C 194

presenting bill to contractor doing work shows no intent to relinquish claim against party who employed contractor and had agreed to indemnify plaintiff, 102 C 489

agreement de reinspection and reacceptance of earlier defective deliveries did not deprive buyer of privilege of repudiating balance of contract, 102 C 529

payment of instalments by buyer after knowledge of fraud is not waiver as a matter of law where action is not based on rescission but is brought to recover damages, 103 C 237

waiver of performance of condition precedent; may be express or implied from conduct disclosing such an intent, 103 C 624

waiver by vendor of provision requiring weekly payments; can only be again enforced after notice to vendee, 105 C 671

right to sue to cancel contract with corporation to purchase its stock not waived by beginning suit on unauthorized contract with agent of corporation to repurchase, 106 C 41

surety may waive personal right to discharge upon unauthorized alteration of terms of debt, 106 C 339

where vendor of land tenders deed he waives claim that balance due from purchaser had not been legally tendered, 115 C 452

so long as it remains possible to carry out original purpose of development, each purchaser of lot has right to protection of restrictions in absence of laches, waiver or abandonment, 117 C 176

mortgagee's president assured receiver of mortgagor that he would not bother him for payments on principal for couple of years; *held* assurance given for protection of receiver only and not binding agreement as to corporation which took over property for benefit of stockholders of mortgagor, 117 C 218

—nor could such corporation claim benefit of it by way of waiver or estoppel, 117 C 218

—waiver could be limited to intent of parties, 117 C 227

receipt of smaller instalment than that due on note, in ignorance of fact that contract provided for a larger instalment does not establish intent to waive provisions, 121 C 140

fact that contract contained provision that no change should be made in it except in writ-

§ 6 Waiver

ing, nil sig. if circumstances indicated that this provision was waived, 121 C 182

—and such waiver arises out of parol modification, 121 C 183

where guarantors “expressly waive all demand and notice of protest,” the waiver is to be construed as waiver of demand on maker, 121 C 414

acceptance of work, authorization of final payment and release of bond *held* not waiver of State’s right to sue contractor for damage from failure to maintain road closure signs, as matter of law, 126 C 350

no waiver by virtue of contract where no relinquishment of a “known right” was involved, 127 C 223

there was no waiver or estoppel where party paid for gasoline at higher price than contract called for upon definite promise that overcharge “would be fixed up,” 127 C 291

§ 7. Insurance

knowledge and acceptance of premiums by insurance company *held* a waiver, 23 C 254

acceptance of overdue premium *held* a waiver of time, 25 C 550

admission by general agent *held* waiver of defect in preliminary proof of loss, 31 C 203

waiver of condition of policy, where removal to building in which hazardous goods were stored, 31 C 208

waiver of forfeiture by increase of insurance, with knowledge, 31 C 209

absolute denial of liability is waiver of formal proofs of loss, 34 C 570, 40 C 64

—and of condition fixing time before bringing suit, 34 C 570

conditions expressly for insurers may be waived, 37 C 249

—plaintiff may prove waiver in suit on policy, 37 C 249

misstatement in application can be waived only by authorized officer, 41 C 174

forfeiture by nonpayment of premium *held* waived by acceptance of overdue premium after death, with full knowledge, 44 C 91

occupation by tenant, when waived, 47 C 560

provision in fire policy de sworn certificate of loss *held* not waived by agent’s proof of loss without objection to omission of certificate, 50 C 551

—nor by the fact that company objected to payment on other grounds, 50 C 551

—nor that proofs had been in the hands of company for two years and certificate had not been called for, 50 C 551

demand and acceptance of assessments on life policy after right of termination had accrued *held* a waiver by company, 56 C 116

receiving premiums on life insurance policy after notice of ground of forfeiture *held* a

waiver; knowledge of agent is knowledge of company, 56 C 528

condition of mutual benefit society that member pay one dollar at end of first year; receiving dues for sixteen months without demand *held* a waiver, though the dollar was due at the end of the year without demand, 63 C 174

provision that only president of company can waive conditions, or bind company by his statements; statements of agent admitted, 66 C 238

—agent’s knowledge that statements in application were false, and collection of premiums by company *held* not to estop company, 66 C 240

presumption of waiver cannot be based on presumption that agent has made communication to company, 66 C 240

policy issued on ambiguous, indefinite and imperfect answers is a waiver of insurance company’s rights, 83 C 393

acceptance of premium waives right to urge forfeiture of policy, where the insurance company is informed of threatened strike, 83 C 393

clause in policy against waiver construed, 83 C 401

receiving assessment from member of a benefit association after he entered a prohibited business *held* not a waiver, 84 C 357

retention of premium by insurer after he knew of breach of condition and prior to loss is waiver of right to avoid policy, 86 C 15

—retention after loss does not waive right, 86 C 15

by interpleader, benefit association does not waive noncompliance with its by-laws as to change of beneficiary, 91 C 115

waiver of provision of life policy requiring its surrender before beneficiary changed, 92 C 488

insurance company which receives and acts on oral notice of loss waives terms of policy requiring written notice, 94 C 118

where in action claim is both for sickness and accident but only notice had been given for former, letter of insurer referring to claim for latter *held* not to be waiver of proof of loss, 96 C 443

—waiver defined, 96 C 444

waiver of formal requirements of by-laws of mutual insurance association as to reinstating member suspended for nonpayment of dues, 101 C 648

—by custom known to officers, 101 C 648

—basis of such waiver is modification of contract by mutual consent, 101 C 656

failure of insurance agent to inquire whether insured was sole owner of automobile no ground of waiver of breach in that he

was only owner under conditional sale, 102 C 370

- waiver of breach from accepting premium after knowledge, 102 C 381

where insurer brings interpleader on policy disclaiming interest in proceeds, and makes one claiming by parol assignment a defendant, it waives provision in policy that assignments shall be written, 103 C 346

waiver may be shown by direct or circumstantial evidence, 105 C 162

- conduct of representative of insurer only explainable on ground that it has waived insured's failure to fulfil condition of policy, 105 C 162
- though company asserts it does not intend waiver, 105 C 162

by participating in defense in action against insured under policy of indemnity, insurer does not waive claim that loss not covered, if it gave notice at the time, 107 C 446

in insurance, finding of waiver is one of fact, 108 C 349

insurance company may waive conditions of policy inserted for its benefit, 108 C 652

- requirement in liability policy that immediate notice be given company and papers in any action be forwarded, 108 C 652

fact that insured was examined by company's physician would not establish waiver of sound health warranty unless physician ought to have discovered condition, 114 C 333

- waiver must be pleaded, 114 C 335

waiver of assured's breach of co-operation clause, or estoppel to take advantage of it, may arise from insurer undertaking and continuing defense of action with knowledge of breach, 117 C 89

- rule applied in most cases where insurer had knowledge of breach before trial, 117 C 89
- reason is that action in conducting defense is inconsistent with purpose to assert forfeiture and convincing of intent to waive it, 117 C 94
- cases where knowledge of breach was not obtained until the trial, recognize admissibility of finding of waiver of breach, at least as question of fact, 117 C 89

that defendant continued to pay interest on note to bank after latter's receivership not waiver of right to set-off, 118 C 42

unless rights in third parties have arisen, method of change of beneficiary may be waived by insurer, 120 C 314

provision that change of beneficiary in insurance policy can be made only upon presentation of policy for indorsement by insurer may be waived by latter, 120 C 633

failure of insurer to enter appearance for assured where no evidence that latter knew of failure, no estoppel or waiver of defense

of assured's failure to co-operate, 127 C 693

- same as to certain statements by insurer's representative in absence of evidence that they came to knowledge of assured, 127 C 693

if insurer, knowing statements in application for reinstatement of policy to be untrue, reinstates it, it waives cause of avoidance and is estopped from taking advantage of it, 128 C 591

- possession by insurer of knowledge of invalidating facts is essential prerequisite to such waiver or estoppel, 128 C 591

- but where applicant certified that she was in good health and actually had cancer which neither she nor insurer knew, latter did not waive defense of material misrepresentation and was not estopped, 128 C 592

§ 8. Landlord and Tenant

objection to use forbidden by lease *held* waived by knowledge of outlay for such use, 44 C 42

- knowledge of agent with power to collect rents and institute suits is knowledge of lessor, 44 C 42

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breach of condition; demand and entry; waiver by receiving rent, 78 C 355

waiver of tenant's default good defense in summary process; basis of waiver and when applicable, 92 C 144

tenant cannot defend on basis of provision in a lease waived by him, 93 C 534

doctrine that landlord cannot claim forfeiture of lease where improvements are made rests on estoppel, 93 C 638

if summary process is pending, rent can be accepted if taken as compensation for use and occupation without waiving forfeiture, 95 C 281

notice of desire to renew a lease may be waived, 95 C 445

waiver of notice to renew lease *held* to apply only to time of giving notice, not as to necessity of notice, 96 C 403

statement by assignee of lessor that he knew terms of lease not basis for finding waiver as to notice for its renewal, 97 C 619

acquiescence in lessor's statement that new lease was not necessary is not a waiver, 98 C 167

- especially if required notice of election to renew be given shortly thereafter, 98 C 167

landlord may expressly, or by his conduct, waive privilege of termination, as by acceptance of rent after knowledge of breach, 103 C 497

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- waiver by lessor of provision in lease for-bidding assignment or subletting; it may be express or implied, 105 C 488
 - permitting subletting without objection as waiver, 105 C 488
 - oral assent as waiving requirement of written contract, 105 C 488
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 - binds purchaser from lessor's estate who relies on notice given by representative of estate of willingness to accept surrender, as he was not bona fide purchaser without notice, 105 C 488
- waiver of violation of covenant in lease against subletting by accepting rent thereafter with knowledge, 107 C 459
 - of claim of waste in leaving tenement exposed to elements after fire by accepting rent after building repaired and lessees had re-entered, 107 C 459
- where receiver was appointed for leased hotel, waiver by landlord of right to claim default under lease does not waive his rights under covenants on termination of lease, 113 C 716
- tenant's failure to immediately move because of inadequate heating not waiver of landlord's covenant, 115 C 243
- lessor may waive requirement of notice as condition to renewal or extension of lease, 116 C 90
 - but payment of increased rent provided in covenant for extension *held* not a waiver of such notice, 116 C 86
- one may waive personal obligation of another to the one waiving; one cannot waive obligation owed by another to public, 117 C 355
 - tenant cannot waive (by use and knowledge) statutory obligation of landlord to keep stairway lighted, 117 C 347
 - or obligation to maintain fire escape required by ordinance, 117 C 357
- lessee waived right to claim termination of lease by reason of condemnation by joining in underlying agreement reducing rent of assignee of lease, 118 C 86
- promise to reduce rents in future could not be supported on doctrine of waiver, 118 C 101
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- purchase of abandoned ship is no waiver of the abandonment, 1 C 183
- silence of elector arrested at polls is no waiver of privilege, 3 C 537
- exemption from taxation is not waived by voluntary payment for twenty years, 11 C 251
- irregular action by railroad company in taking land, *held* waived by acquiescence for two years, 25 C 516
 - so also receipt for money paid for land taken, 25 C 516
- objection that selectmen are not empowered to sue *held* waived by delay, 38 C 112
- payment by father after notice not to trust son *held* waiver of effect of the notice, 41 C 365
- payment in full is no waiver of damages for defect in work, though payment is voluntary and with knowledge of defect, 46 C 558
 - waiver how inferred in such case, 46 C 558
- motion to recommit report of majority of committee on layout *held* a waiver of objection to absence of third member, 59 C 203
- assigning other reasons for refusing tender than that it was not valid *held* not to waive this objection, 67 C 585
- acquiescence in trespass in construction of street not bar to action, where plaintiff lacked means to bring action before, 73 C 359
- power of executor to waive presentation of claim against estate, 73 C 405
- waiver of vendor's lien by claiming possession upon another basis, 74 C 541
- knowledge by some officers of city of illegal act of another not basis of waiver against city, 75 C 145
- selectmen of town cannot waive requirements of Good Roads Act, 81 C 615
- savings bank does not waive statutory provision for its protection where a book is lost until it knows of the loss, 87 C 341
 - if after knowledge of loss it refuses to pay depositor because of "no funds," there is a waiver, 87 C 341
- lack of notice of a meeting may be waived, 96 C 50
- waiver of right to insist upon a certain construction of will, by years of acquiescence, 99 C 648
- waiver of formal defects as to membership in fraternal benevolent association by entering and carrying name on books and collecting dues, 104 C 539
- waiver by parent of right to recover damages where he has been party or consented to action by minor involving same damages, 104 C 594

statement of creditor to creditors' committee that he would withdraw claim for a reasonable time but would expect his percentage not a waiver of his claim, 110 C 379

waiver of defects in execution of deed and ratification of its delivery relate back to time of delivery, 114 C 116

issuance of working card by association *held* not waiver of member's default in paying dues, 114 C 309

acceptance of royalties for quarrying in violation of restriction waiver of past damages, 115 C 70

—but not of right to prevent future breaches of restriction, 115 C 70

plaintiff learned that wife had epilepsy after marriage but not that she had had it before, and continued to live with her; *held* no laches or waiver of right to divorce, 115 C 303

dealings between plaintiff and defendants after fraudulent conspiracy but before discovery of it do not create waiver, 116 C 375

where committee did not know petitioner's studies were confined to evening school they did not waive the requirement of study in approved law school by allowing him to take examination, 116 C 409

—waiver cannot be established by a consent given under a mistake of fact, 116 C 409

assistant city clerk cannot waive compliance with statute by accepting defective notice of injury or thereby estop city from failure to meet statutory requirements, 117 C 398

requirement of written notice of claim is of essence of employee's right and failure to comply cannot be waived or avoided, 118 C 319

plaintiffs claimed preference over other members of association who signed waiver authorizing transfer of its funds to K Company, now bankrupt, and waiving all claims to them; *held*

—intent of waiver was to place funds temporarily at disposal of K Company and not to relinquish rights of signers in funds, 118 C 521

—and as association's claim in bankruptcy was allowed in full, plaintiffs were not prejudiced by waivers and not entitled to preference, 118 C 521

husband who took conveyance in wife's name, *held* by conduct to have waived any interest by resulting trust, 121 C 153

no waiver of exemption of printing press from attachment where owner did not know it was exempt at time, 121 C 423

of lien of chattel mortgage by mortgagee giving mortgagor permission to sell, 122 C 100

objection to inclusion of property within limits of municipal corporation waived where

property owner has had fair opportunity to make it and failed to do so and public or private rights have intervened, 122 C 398

immunity of charitable institution for negligence and torts of agents not placed on ground of waiver but of public policy, 123 C 646

no evidence that mortgagee waived right to claim that bowling alleys were part of realty, 124 C 66

by accepting part of money due her under executory accord, plaintiff did not relinquish right to have full amount paid, 126 C 44

of right to claim immunity by one voluntarily surrendering papers to officer serving subpoena duces tecum, 126 C 61

stockholders who had previously signed proxies to be voted for voluntary dissolution of corporation not knowing facts, neither waived right nor were estopped to ask appointment of receiver, 127 C 25

constitutional right to jury trial may be waived, 127 C 336

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written notice of injury may be waived; upon facts jury could have found that defendant never intended to claim it until case came into hands of attorney, 128 C 133

bank and depositor could by joint agreement waive compliance with by-law requiring presentation of deposit book, 128 C 517

—officer of depositor had incidental authority to waive this provision, 128 C 518

—bank which permitted withdrawal of money without presentation of book waived requirement, 128 C 518

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§ 10. Pleading and Proof

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§ 10 Waiver

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in insurance, finding of waiver is one of fact, 108 C 349
in action on contract, waiver of requirement of notice for its termination cannot be proved under general denial; must be specially pleaded, 108 C 537
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where there is no express waiver one may be implied, 127 C 170, 128 C 135
—such waiver may be found as an inference of fact from conduct of party, 127 C 170, 128 C 135
conclusion that policeman waived right to three-day notice provided by charter of meeting to consider his dismissal was inference reasonably drawn from facts found, 127 C 170
where there are facts sufficient to warrant it, determination of whether there is waiver is to be made by trier, 128 C 136
waiver as defense must be specially pleaded, 129 C 682
—allegation that mortgagee was willing to approve plans and specifications not allegation of waiver by it of requirement in lease that it sign them before lease should be effective, 129 C 682
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WANTON, WILFUL AND RECKLESS MISCONDUCT

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duty of common carrier to abstain from acts of wilful, wanton or intentional injury to persons or to property in its possession, 51 C 150, 67 C 417
distinctive element of wilful or malicious injury, in contrast to negligence, is design to injure, either actually entertained or implied from conduct and circumstances, 83 C 503
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wilful misconduct must evince reckless disregard of consequences to himself by him who is guilty of it, 97 C 47
misconduct which is thoughtless, heedless, inadvertent or of the moment or which arises from error of judgment is not wilful, 97 C 47
employee's conduct in working when ill held not wilful misconduct, 97 C 47
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wanton or wilful misconduct defined, 107 C 197
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Wanton, Wilful and Reckless Misconduct

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wilful and wanton misconduct are forms of criminal negligence, 110 C 244

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fact that defendant had been drinking not basis for finding of reckless operation, but is to be considered with other circumstances, 114 C 473

where decedent's car collided with another and third car ran into rear of decedent's, *held* that driver of last might be found guilty of recklessness, 115 C 356

nonsuit where no evidence of wanton or wilful misconduct by driver of car in which plaintiff was guest, 116 C 67

no specific rule on what is reckless or wanton misconduct; question for jury, 116 C 82

contributory negligence not a defense, 116 C 471

—but it is a defense where cause of action is for negligence based on violation of the statute forbidding reckless operation of motor vehicles, 116 C 471

evidence *held* insufficient to establish recklessness in operating train over grade crossing, 116 C 638

reckless misconduct to be basis of recovery must be substantial factor in bringing about injuries complained of, 116 C 672

—sometimes occurrences before or after those involved in accident may serve to characterize conduct as reckless, 116 C 672

—but they are not material unless there was misconduct causing accident at time it occurred, 116 C 672

defense that plaintiff recklessly exposed himself to danger in riding with incompetent driver, differs from one of assumption of risk, 117 C 97

where rope across highway conceded to be nuisance grounded in negligence, charge that driver liable only if his fault amounted to indifference to consequences *held* erroneous, 117 C 360

confusion as to distinction between negligence and reckless misconduct, 117 C 613

judgment obtained by guest in automobile against owner for reckless disregard of his rights is not liability for "wilful and malicious" injury within meaning of Bankruptcy Act excepting such liabilities from discharge, 119 C 532

—wilful and malicious injury is one inflicted intentionally without just cause or excuse, 119 C 532

—distinction between such act and one which was intentional in the sense that it was voluntary, 119 C 532

—distinction between reckless misconduct and negligence on one hand and intentional misconduct on other, 119 C 532

where case was submitted on two grounds, negligence and wanton misconduct, and interrogatories showed jury found for plaintiff on both and that he was not contributorily negligent, errors assigned with reference to wanton misconduct will not be considered, 120 C 445

—only effect of finding wanton misconduct would be to permit recovery notwithstanding contributory negligence, 120 C 449

when a defense to action for injury from explosives, 124 C 366

wanton misconduct defined, 125 C 150

collision at intersection; *held* no basis in evidence for finding of wanton misconduct, 125 C 151

interrogatories proper to ascertain basis of verdict where negligence and wanton misconduct alleged in one count, 125 C 151

complaint alleging that death "was caused solely by the reckless, careless and negligent operation" of an automobile and assigning usual negligence specifications, does not state with desirable accuracy a cause for wanton misconduct, 127 C 79

no specific rule for determining reckless or wanton misconduct; is question of fact; principles applicable in the determination stated, 127 C 79

on facts jury could not have found reckless misconduct and court did not err in failing to submit this issue, 127 C 79

contributory negligence not a defense, 127 C 81

allegations of reckless misconduct *held* to be sufficient to justify court in submitting issue to jury in absence of objection until after verdict, 129 C 302

recklessness is a state of consciousness; the actor must recognize that his conduct involves risk substantially greater than is necessary to make his conduct negligent, 129 C 302

state of mind amounting to recklessness may be inferred but there must be something more than failure to exercise reasonable care, 129 C 302

where pedestrian injured by automobile at intersection, claims of proof *held* insufficient to justify submitting issue of reckless misconduct as basis for removing contributory negligence from consideration of jury, 129 C 302

complaint intended to present wanton misconduct should employ language explicit

Wanton, Wilful and Reckless Misconduct

enough to clearly inform court and counsel that it is relied upon, 129 C 307
allegation that street sweeper created inherently dangerous obstruction and con-

stituted nuisance falls short of proper allegation of wanton misconduct, 129 C 356
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WAR

See MILITARY

WARD

See GUARDIAN AND WARD

WAR DEPARTMENT

See UNITED STATES

WAREHOUSEMEN

See also AGENCY; BAILMENTS; CARRIERS

in assumpsit against railroad as warehousemen for nondelivery of two bales of cotton, defendants bound to prove either delivery or ordinary care in keeping goods, to escape liability, 37 C 272

—burden here not on plaintiff to show manner of defendant's negligence, 37 C 272

warehouse receipt; nature; indorsement; agreement of warehouseman with former owner as to retention till purchase price paid; construction of terms as to retention until "all other amounts due are paid"; estoppel from stamping "tax paid" on receipts, 70 C 76

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estoppel of warehouseman to deny bailor's title; effect of admitting receipt of goods in pleading; degree of care required; conversion, 79 C 342

rights of holder of receipt given under "field storage warehousing" agreement, 90 C 415
while original attempted possession by ware-

houseman was insufficient to constitute a valid pledge against creditors, the subsequent actual possession perfected the lien, 90 C 415

—although within four months of bankruptcy, *held* not a preference, 90 C 415

no negligence by warehouseman in permitting grain to be taken by receiver of pledgor, 90 C 415

warehouseman *held* negligent, either in not taking possession of lumber described in its receipts at the time they were issued, or in stating in such receipts that it had taken possession, 91 C 57

damages for decrease in liquor first privately stored by attaching officer and then put in warehouse without gauging, 108 C 660

—possession of key to lock on door not joint control relieving warehouseman from presumption of negligence, 108 C 660

—where receipt did not state quantity or value of goods plaintiff bound to prove them, 108 C 660

where bank received warehouse receipt from one against whom bankruptcy petition had been filed, its right to retain proceeds depends on whether it took it in good faith, without knowledge of breach of duty in its negotiations and for value, 110 C 591

WAR RISK INSURANCE

See MILITARY

WARRANT

See also ARREST; PROCESS § 1; PUBLIC OFFICERS § 12;
SEARCH AND SEIZURE

if warrant issues from officer who has no jurisdiction, all who are voluntarily and actively engaged in its procurement and execution are trespassers, 2 R 152, 1 C 40, 4 C 107, 10 C 519, 11 C 95, 476, 12 C 384, 17 C 178, 75 C 350, 93 C 552, 129 C 549

not vitiated by direction to appear before subscriber "or some other justice," 2 D 564, 29 C 453

complainant's oath sufficient for warrant on *qui tam* prosecution, 4 C 118

one justice may issue warrant, returnable before another justice, under statute, 7 C 286, 59 C 372

person confined in jail on void warrant may lawfully escape, 7 C 455

officer of limited jurisdiction must cause jurisdiction to appear on face of warrant, 10 C 520

—so when issued by captain of military company, 10 C 519

legal warrant or execution may justify officer, but party must show judgment on which it is founded, 12 C 257

right of justice, at common law, to direct warrant to private person, 15 C 265

—on executor's complaint against person having goods of an estate, 15 C 266

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warrant not void for unauthorized proviso as to levy of expenses, 19 C 152

warrant to clear street of all nuisances; *held* not void for generality, 19 C 152

warrant good upon its face protects officer who serves it, though not issued by competent authority, 30 C 580

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signature of city attorney *held* to be act of City Court, where charter provided that process should be signed by judge, clerk, or city attorney, 59 C 169

—immaterial that attorney signed as city attorney, 59 C 179

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WATERS

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surface water and watercourse distinguished, 112 C 566

—where watercourse is blocked, town as upper riparian proprietor cannot claim right to keep drain open across private land where it does not replace watercourse, 112 C 563

—nor can it claim such right by prescription where drain was through a dooryard contrary to statute, 112 C 563

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—and if flow is increased by natural causes or acts of others which constitute no legal wrong, lower owner not justified in doing anything to prevent natural flow-off of increased volume, 120 C 168

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upon claim for damages for overflow resulting from failure of defendant to maintain embankment on mill pond, finding that the defendant was bound to maintain embankment between certain points, and that the water broke through between those points *held* to mean that the defendant's duty was certain over a part of the designated place, 55 C 370

—but uncertain as to the exact extent of the line to be maintained, 55 C 370

—and that the judgment was to be regarded as based upon failure to maintain the portion upon which defendant's duty was certain, 55 C 370

where colonial Legislature had confirmed deeds of land under and around a pond, *held* no public or common right of fishing remained, 61 C 175

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§ 6 Waters

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- but cannot take ice for mercantile purposes where its removal would cause material injury to mill owner, 62 C 398
- a mill owner who has merely pondage rights is not absolute owner of ice on pond, 62 C 398
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- owner of mill pond can cut ice if he does not interfere with lower riparian rights, 83 C 417
- conclusion that use of pond for bathing by lot owners in subdivided tract and the public was unreasonable sustained, as regards city taking water from stream below, 111 C 352
- city might properly post notices forbidding bathing; limitations upon such use considered, 111 C 352
- bathing as a riparian right, 111 C 360
- right of flowage only an easement, 126 C 365
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- lower proprietor cannot prevent city from cutting off flow of sewage into stream, though largely made up of water taken from same stream higher up, 69 C 375, 70 C 720
- pollution of stream by city by discharge of sewage therein, 69 C 668, 72 C 531, 561, 76 C 435, 80 C 179
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- that fish live in stream and cows drink it, no defense; nor is fact that plaintiff's premises drain into sewer, 72 C 561
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- refusal of servants of plaintiff to work on premises after suit brought admissible, 72 C 531
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- contribution of others than defendant to injury no defense; similar acts of plaintiff no justification, 72 C 561
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- upper riparian mill owner can make reasonable use of stream; this is a matter of fact for jury, 83 C 417
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- upper riparian owner liable for throwing sawdust in stream to injury of lower pond owner; damages, loss of profit on ice, 83 C 417
- fact that others than defendant had polluted stream, immaterial, 83 C 417, 88 C 125
- because defendant had made cider for plaintiff and had thrown pomace into a stream is no excuse for depositing larger quantities so as to injure plaintiff, 83 C 417
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- city cannot discharge polluted water into a stream above a riparian owner which would have flowed into it below, 88 C 125
- act of lower proprietor in filling in a stream so water would not flow off is immaterial when, 88 C 125
- pollution from increased population inevitable and irremediable, 101 C 310
- facts held to show reasonable user of Norton River by rolling mill and refusal of injunction proper, 101 C 310
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—right of public, including municipalities, to use them for sewage, provided no nuisance is created, 112 C 199

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—upper proprietor had no right to materially pollute pond or interfere with any reasonable use of it, 114 C 496

—municipal corporation liable for polluting stream by discharging sewage into it, 114 C 496

—where sewer system would result in permanent pollution municipality liable for permanent taking of stream, 114 C 496

—damages for destruction of ice cutting privilege *held* properly based on its full value, 114 C 496

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right to recover damages for pollution of stream by sewer did not arise when sewer constructed but only when property right to harvest ice destroyed, 114 C 512

there is no sound basis for distinction between pollution due to water which percolates through soil and that due to water which runs in underground streams or channels, 121 C 579

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—present tendency is to qualify absolute right of landowner to immunity from liability for interference with percolation or flow of subterranean waters, 121 C 587

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—if pollution of subterranean water constitutes nuisance, it is immaterial whether or not person responsible has exercised reasonable care, 121 C 588

—and in present case as percolating of oil into plaintiff's premises would be nuisance, unnecessary for it to prove negligence, 121 C 588

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WILLS

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See also ANNUITIES; ESTATES OF DECEASED PERSONS; EXECUTORS AND ADMINISTRATORS; PROBATE COURT; TAXATION; TRUSTS

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relation of parent and child raises no presumption of undue influence, 88 C 394, 656

undue influence cannot be proved on surmises, suspicions, or deductions from inconsequential facts, 88 C 394

—must be shown by direct proof or inferences from proven facts, 88 C 394

proof that testatrix's mind might have been poisoned against A by B with no evidence that B ever spoke to testatrix about her will or had knowledge of its contents, not

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- sufficient to prove undue influence, 88 C 394
- not enough to show that a child had a chance to influence parent; must appear that he abused it, 88 C 656
- how testator acquired property may be admissible on issue of undue influence, 88 C 656
- but statements to deceased husband of witness are hearsay, 88 C 656
- relation of special confidence between testator and beneficiary not an heir or relative raises prima facie presumption of undue influence; the facts may weaken or strengthen it, 91 C 40
- court can comment on fact that testatrix wrote will herself, 91 C 388
- evidence allowed to show that acts of defendant would have made testatrix unlikely to disinherit other children in defendant's favor, 91 C 388
- evidence of acts and conduct of defendants subsequent to execution of will admitted to show concerted action for the purpose of getting the property, 91 C 388
- sufficient charge on undue influence, 91 C 389
- apparent preference in a will for defendant may show undue influence, but it is not conclusive as testatrix can prefer whom she wishes, 91 C 389
- undue influence is shown by facts and circumstances sufficient to convince, seldom by direct and positive evidence, 91 C 389, 93 C 630
- when gift deemed prima facie invalid from undue influence, 93 C 539
- only when made to attorney, physician, guardian, religious advisor, etc., 93 C 539
- no presumption of undue influence merely because legatee enjoyed trust and confidence of testator, 93 C 539
- while undue influence may be shown by circumstantial evidence, it must lead fairly to this conclusion, 93 C 630
- mere fact that legatee is niece with whom testator lived about six months, not enough, 93 C 630
- must appear that legatee stood in professional or business relationship to testator, 93 C 630
- unreasonableness, unfairness or injustice of will tends to prove, but does not conclusively establish, testamentary incapacity or undue influence, 104 C 419
- verdict that testator lacked testamentary capacity and was subject to undue influence held unreasonable, 105 C 630
- ordinarily burden to prove undue influence rests on contestant, 108 C 572
- but not where natural objects of testator's bounty are excluded in favor of one whose relationship to testator was one of special trust and confidence, 108 C 572
- latter class includes lawyer who drew will, guardian, physician or religious counsellor, 108 C 572
- in such case relationship established prima facie case of undue influence, which must be rebutted by clear preponderance of evidence, 108 C 572
- rule does not put burden of proof on natural object of testator's bounty as parents or child, 108 C 572
- natural object of testator's bounty defined as including only those who would take as heirs, 108 C 572
- where will gave property to second cousin and housekeeper, and uncle contested, they were not natural objects of testator's bounty, 108 C 572
- whether former, who was in close intimacy with testator occupied a position of special trust and confidence was question of fact for jury; so, as to cousin in whose house testator lived, and who was trustee of large part of his property, 108 C 572
- as there was a nearer relative than either they were not natural objects of his bounty, 108 C 572
- housekeeper held to occupy purely personal relationship to testator and burden of proof not on her, 108 C 572
- conclusion of undue influence cannot rest on surmise, suspicion or inference from inconsequential facts, 109 C 734
- charge as to testamentary capacity and undue influence sustained, 111 C 253
- on issue of undue influence whether confidential relationship existed between testator and one not a relative who lived with her was question of fact, 111 C 313
- whether certain gifts in will would be invalid as violating Rule against Perpetuities not relevant, 111 C 313
- where question of partial invalidity not raised at trial it will not be considered on appeal, 111 C 313
- facts or circumstances relevant to undue influence are not inadmissible because they occur after testator's death, 114 C 247
- power of court of equity to relieve against decree of Probate Court admitting will where there was fraud, undue influence and ignorance of defense, 117 C 565
- when natural objects of testator's bounty have been displaced by someone in relationship of trust, such as lawyer who drew will, use of undue influence is presumed, 118 C 63
- and proponents of will have burden of disproving actual exercise of such influence, 118 C 64
- will leaving property to niece, made in fear that she might turn him out of house; no undue influence, 118 C 709
- and no insane delusion in belief of testator that his property might not be suf-

ficient to maintain him during life, 118 C 709

where plaintiff claimed lack of testamentary capacity and undue influence and general verdict could be sustained on first ground, denial of motion to set it aside correct, 124 C 468

statement of testator that will was all right, made four years after execution, basis for inference that it was not made as result of undue influence, 127 C 643

—statement evidenced his state of mind and was not inadmissible as hearsay, 127 C 643

§ 7. —Probate, Establishment and Contest

whether decree establishing will, will be conclusive of its terms, *quaere*, 6 C 270

will could not be proved by child of tenant in tail who died more than ten years after decease of testator, 14 C 210

probate of will by minor, after ten years, requires what, 14 C 210

—creditors and bona fide purchasers are entitled to rely on statute barring probate of will, 14 C 210

expenses of suit establishing will are how paid, 19 C 416

due execution of established will cannot be collaterally impeached, 23 C 1

due execution can be established by Probate Court only, 23 C 1

probate decree approving will of minor not empowered to devise land is not conclusive, 31 C 417

will of inhabitant of another State, prior to 1856, not made according to our statute, *held* void as to real estate here, 33 C 128

—is not cured by removal here and death prior to 1856, 33 C 128

—validated by acts of 1856 and 1863, 33 C 129

duty of Probate Court as to proof of will, 34 C 446

probate decree approving will does not validate void bequests therein, 35 C 523

in trial of validity, on appeal, all attesting witnesses need not be called, 36 C 277

—but heir may insist that all be called, 36 C 277

—such right waived if not insisted upon at the time, 36 C 277

evidence *held* insufficient as to contents of lost will to establish will, 40 C 587

an unrevoked will, lost or destroyed, may be admitted to probate, 40 C 587

—but contents and nonrevocation must be clearly established, 40 C 587

—proof must be of entire contents of such will, 40 C 589

contract of A dying before testator not to contest will does not affect A's heir, 49 C 456

—latter being heir of testator in his own right and not as heir of A, 49 C 457

where testator died within a district of this State, but was found domiciled in New York by court there, *held* judgment conclusive upon all parties to the proceedings, 50 C 330

—though will was executed here and was invalid by our law, 50 C 330

—duty of court here to admit will to probate for ancillary administration, 50 C 330

—statute does not exclude such a will, 50 C 339

in absence of reasons of appeal the issue in Superior Court is whether will is valid, 54 C 120, 63 C 72

main issue relating to validity is legal execution and testator's capacity, 63 C 69

—fact of appeal on ground of undue influence does not relieve proponents of duty to prove, 63 C 69

an appeal from probate of a will is not an "action" under statute de memorandum of deceased persons, 63 C 393

as to joint will providing that it is not to be probated until the death of the survivor; effect of probating it, 67 C 317

every will shall be propounded for probate as soon as may be after testator's decease, 67 C 320

proof where one witness cannot be found, 74 C 257

proof by affidavit of witness under statute not unconstitutional, 74 C 257

proof of will probated elsewhere by exemplified copy, 77 C 644

will executed in another State according to its laws admissible to probate here and effectual to pass any estate of testator situated here, 80 C 438

—donee of power of appointment intending to exercise it by instrument in nature of will according to laws of New York *held* to have done so, 80 C 438

Probate Court can investigate question of testator's domicil, 86 C 351

will proved out of the State ineffective here; how proved here, 86 C 699

verdict can be directed in a will case, 88 C 94

duly executed will of one of sound mind presumed to be valid; burden is on contestant, 88 C 136

attestation clause material in showing where will was executed, 91 C 265

right to insist that all available witnesses be called; presumption of their death after thirty years, 91 C 265, 269

if no place is named in a will as place of execution, and the witnesses are dead, indirect evidence of that fact is admissible, 91 C 265

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proponent need not go further than to lay a basis from which jury can infer where will was made, 91 C 265

proponent can show law of State where will was alleged to be made, 91 C 265

presumption in favor of execution of an ancient document is one in favor of its due execution in fact, 91 C 265

if one is a party to admitting a will to probate, he cannot later attack it in a civil action against brothers and sisters for procuring it by undue influence, 91 C 515

in proving a will all that is necessary is to show that it is more probable than otherwise that will was properly executed, 93 C 53

—it need not be established by subscribing witnesses, 93 C 53

Probate Court on presentation of exemplified copy of a foreign will has jurisdiction to consider whether it should be recorded, 93 C 550

appeal after five months from passing order admitting will on claim that appellant had not received notice is not good, if notice was published in paper and put on signpost, 96 C 319

title to land in Rhode Island, under Connecticut will, can be effectually determined only by Rhode Island courts, 98 C 549

—devise to — Braman; courts of Rhode Island to decide who was intended, 98 C 549

charge as to burden of proof upon issue of formal requirements sustained, 111 C 253

—so as to testamentary capacity and undue influence, 111 C 253

testator presumed to intend law of residence to apply though property lies in another State, where no question of title of land is involved, 113 C 62

—where by our law executor should pay debts secured by mortgage on land devised, this rule applies to land lying in another State, 113 C 62

P sought declaratory judgment to determine whether decree of Probate Court that will was void settled conclusively rights of parties and, if not, determination of his rights; *held* demurrer to it should have been overruled, 116 C 201

—but as plaintiff had no title to property, demurrer to prayer that title to real estate should be quieted in him properly sustained, 116 C 201

power of court of equity to relieve against decree of Probate Court admitting will where there was fraud, undue influence and ignorance of defense, 117 C 565

statutes evince clear legislative intent that will of every person shall be offered for probate, 124 C 100

—agreement for suppression of will and probate of earlier one, though joined in by all beneficiaries and not fraudulent, void, 124 C 96

suit to cancel agreement to compromise contemplated will contest on ground of undue influence; consideration necessary to sustain such an agreement, 124 C 625

although provision for jury trial in case where will is contested is statutory, not constitutional, court has no wider power to set aside verdict, 126 C 294

—it cannot pass on weight of testimony if jury acted reasonably, 126 C 294

notice of hearing on probate of will to all parties "known to be interested in the estate" means known to Probate Court, 129 C 309

—where notice was given to cousins of half blood, the only persons known to court to be interested in estate, it complied with statute though executor had been informed that there were cousins of full blood, 129 C 309

at least as regards admission of wills to probate, Superior Court has all the powers of a Probate Court, 129 C 315

§ 8. Revocation and Republication; Codicils

after-acquired lands pass on republication, 1 R 83

relief in equity after breach of covenant does not revoke will, 2 R 448

whether a will devising real estate attested by three witnesses is revoked by later will having two witnesses only, *quaere*, 4 D 66

will may be revoked by writing on the back of it; such revocation need not be attested by witnesses, 2 C 67

will cannot be republished by parol after revocation, 2 C 67

if revoked by later will, is not revived by destruction of the later will, 3 C 576

—*aliter*, where there is only implied revocation, 3 C 578

a will was revocable by parol prior to 1821, 5 C 164

—*animus revocandi* material to be proved, 5 C 168

bequest once made will stand, unless revocation be clear, 32 C 422

mere absence of the will raises presumption of its revocation, 40 C 588

—declarations and unchanged relation to legatees *held* admissible to show that destruction was while insane and not *animus revocandi*, 40 C 588

revocation of legacy, based on fact which does not exist, is no revocation, 45 C 62

—but will itself must show revocation to be based on this assumption, 45 C 62

revocation of "all devises beneficial to hospital" includes one to outgoing patients, 45 C 62

divorce after bequest to "my wife," *held* not to revoke bequest, 48 C 492

revocation of former will by mere execution of a later will is ambulatory, 50 C 562

—does not take effect until the second is made operative by death of testator, 50 C 562

—revocation of the latter, will revive former, will, 50 C 562

—whether so, if second in express terms revokes former, *quaere*, 50 C 562

—weight of authority is that revoking clause is only operative on death of testator, 50 C 562

—statute of 1821 materially affects the question, 50 C 562

—statute how affected by changes in phraseology, 50 C 562

at common law will was revoked by marriage and birth of child, but not by marriage alone; common law changed by statute, 55 C 178, 180

—but the statute is not remedial so as to be retrospective, 55 C 180

under statute of 1821, a devise of real estate protects a bequest of personal property from implied revocation, 55 C 180

codicil confirming previous will has effect of reexecuting will as of date of codicil, 65 C 149, 67 C 379, 83 C 18, 105 C 59

—but no rule for construction of wills can defeat intent of testator expressed in will itself, 88 C 406

codicil revoking bequest but republishing rest of will, which contains residuary clause, causes revoked legacy to fall into residue, 65 C 150

intent controls; effect of revocation based on mistake of fact, 65 C 156, 70 C 294

—based on erroneous belief that subsequent will is valid, 79 C 123

cancellation; must be in testator's presence; cancellation of part, 68 C 237

revocation, alteration, cancellation, distinguished, 68 C 245

codicil revoked gift to daughter and gave instead in trust for daughter to wife to be paid over as latter deemed best; *held* on death of wife before daughter, original gift revived, 70 C 288

revocation by codicil, 73 C 122

will made bequest to three; codicil gave legacies to two of them, stating that this was all they should receive; *held* to revoke share of these two in original gift and to give whole to third, 76 C 263

will gave life estate, then over; codicil provided that property should remain for certain period in business with distribution of

income; at end of period gift over took effect, 77 C 176

revocation presumed from failure to find will; evidence; burden of proof, 77 C 638

declarations accompanying and preceding destruction of will, admissible, 77 C 639

as to revocation in general, 79 C 364

gift by codicil for life use revokes a gift in fee of same property by will, 83 C 655

revocation by express terms or subsequent inconsistent repugnant provisions, 83 C 655

mere execution of later will with no revoking clause does not revoke prior will as it does not speak until testator's death, 87 C 579, 98 C 21

burden of showing that later will contained revoking clause is on the party contesting, 87 C 579

evidence of person who drew the will that it was his custom to include clause revoking former wills, is not sufficient to prove insertion of such a clause, 87 C 579

whether the subsequent destruction of a will with intent to revive former accomplishes this purpose without republication, *quaere*, 87 C 579

republication after repeal of Statute against Perpetuities takes the will out of statute, 88 C 286, 92 C 408

republication generally makes a will date from that time, 88 C 404

—not so if statutory rights of a child of deceased legatee are defeated, contrary to the manifest intention of testator, 88 C 404

gifts made in will *held* to come within scope of codicil, 91 C 630

if testator makes any statement of declaration in his will showing that after-born children had not been passed by inadvertently, there is no revocation under statute, 95 C 194

—clause reciting that testator made "no separate provision for any child that I may have" is sufficient to prevent revocation by subsequent birth of child, 95 C 194

mere execution of later will not a revocation of previous one, although latter does contain revocatory clause, 98 C 21

—destruction of later will; earlier will, if preserved, entitled to probate, 98 C 21

provisions may be expressly revoked or by subsequent repugnant provisions, 101 C 142

revocation by repugnancy only operates to effect testator's intention, 101 C 142

gift of residue in fee to three sons, including E; then codicil putting E's portion in trust for maintenance and support; *held* fee not reduced to life estate, 101 C 142

when will republished in codicil, it is to be construed as though executed at date of codicil, 106 C 19

necessity of provision for contingency of after-born child does not require beneficial provision, 106 C 76

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subsequent birth of child works complete revocation, and not merely pro tanto, 106 C 76

codicil executed but not probated because revoked, admissible as proof of intention, 109 C 170

will and codicil to be read together, 118 C 357

—language of latter will be held to revoke will or previous codicil only to extent necessary to effectuate intent of testator, 118 C 357

codicil cutting down to life estate remainder interests given grandsons absolutely by previous codicil *held* not a revocation of gifts made to them in first codicil, 118 C 357

—and grandson preferred in first codicil entitled to life estate in portion given him, 118 C 357

republication of will by codicil is in effect making new will with changes contained in codicil as of date of codicil, 124 C 577

—but in construing will, circumstances surrounding execution of both it and codicil not to be disregarded, 124 C 577

bequest to “my nephew” E. C. W.; republication of will by codicil made after death of E. C. W. without change in provision not sufficient to indicate intent to change bequest to grandnephew of same name, 124 C 577

—though extrinsic evidence admissible for purpose of showing such intent, 124 C 578

will gave annuity to P “who is now a member of my household,” and year later testator adopted P; *held* adoption revoked will under statute since there was no provision in it for this contingency, 126 C 369

when original will executed while Statute against Perpetuities in force but codicil, executed after it was repealed, republished will, question of validity governed by common-law rule against perpetuities, 127 C 123

§ 9. Construction Generally

§ 10. —General Principles

subsequent provisions control preceding ones, 6 C 34

limitation of use of personalty, with remainder over, is not favored, 15 C 291

devise never to be construed void for uncertainty, unless necessary, 15 C 292, 60 C 476

a qualification applies to same bequest in former part of will, 22 C 378

of conflicting bequests, the last prevails, unless general intent is clearly otherwise, 22 C 378

precedents are of little weight in cases not precisely analogous, 33 C 222, 40 C 120

all valid provisions must be carried into effect, though some provisions be invalid, 38 C 26

of repugnant clauses the last prevails, 38 C 101

testator may confer power on executor to determine meaning and construction of will, 40 C 9

uniformity of construction desirable in clauses of frequent occurrence, 40 C 120

question for court is not why did testator do so but what has testator done, 54 C 472

child is considered in being from time of conception, when legacy is for child's benefit, 56 C 247

court cannot guess at testator's meaning; it must be ascertained from his language, 60 C 507

word occurring more than once in will ordinarily presumed to be used with the same meaning throughout, 62 C 89, 69 C 707, 73 C 114, 84 C 392, 85 C 245, 89 C 278

—unless context shows it must have a different meaning, 62 C 89

—even though second time is in codicil, 73 C 114, 89 C 278

construed by law of testator's domicile, 67 C 14

—as to land, 70 C 196

—“heirs” given meaning it has in state of domicile and execution, 70 C 49

—as regards conversion of land there; as to land elsewhere, 70 C 195

rule of construction applicable to language of will is rule of law binding court in absence of sufficiently declared intention of testator to contrary, 70 C 90

construction is to be consistent with testator's evident intent and avoid uncertainty, 70 C 468

two paragraphs may be read as one, 72 C 253

will and codicil to be read together, 73 C 122, 82 C 158

subsequent event cannot change construction, 73 C 670, 81 C 34

identical provisions will be given effect only once, 74 C 576

rules of construction generally, 81 C 185

former construction of a will not disturbed even though erroneous; later construction must be consistent therewith, 83 C 369, 85 C 172

cases cited as precedent can have little weight unless facts are substantially identical, 83 C 655, 85 C 135, 99 C 598, 112 C 574, 114 C 445

law assumes that every man may have children till he dies, 86 C 96

existence of will means that testator wished his property to go otherwise than by law of intestacy, 86 C 630, 635

will made in France construed by our law, but technical meaning of foreign words considered for the purpose of correct translation, 86 C 631

meaning of language used depends on provisions and character of instrument; each will its own interpreter, 89 C 270, 99 C 598

words in later clause of will that accurately describe previous provision in same will cannot refer to something testator had not done and be the basis of an implied gift, 89 C 690

court should place itself in position of testator, 91 C 50

will construed in spite of inconsistencies, 91 C 241

same phrase in different parts of the will to be given same construction, 93 C 75

to provide for a contingency is to prepare for the happening implied by its nature; it assumes prevision of the possible event, 95 C 195

if two contingencies are provided for and only one has arisen, other is to be disregarded in construction of first, 98 C 263

when testator overlooks certain contingency court cannot make provision, 103 C 328

will to be construed in light of circumstances surrounding testator, 106 C 236

understanding of heirs as to meaning of a will is not competent evidence, 112 C 569

relative situations of parties, ties of affection, natural motives and moral duties to be considered, 112 C 574

all parts of will to be considered and provisions harmonized if possible, 112 C 574, 117 C 491, 121 C 520

—separate paragraphs may be read together, 112 C 577

where language is ambiguous, construction which will be just, natural and reasonable should be adopted, 113 C 322

where residue is given to be distributed according to the laws of distribution at death of life tenant, ordinarily life tenant is not excluded, 115 C 269

—but rule not applied where testator gave wife one-half of his estate and life use of other half, the latter half to be distributed at her death according to the statutes of distribution, 115 C 269

interpretation of language used in one will rarely is of controlling significance in interpretation of similar language in another will, 117 C 331

regard to be had not only to words directly under scrutiny but to context created by other provisions and to surrounding circumstances, 121 C 106

where clause is dependent upon a contingency which never occurs, it is disregarded, 124 C 464

unless terms of will indicate contrary intent, it is to be interpreted by law of testator's domicile, 128 C 393

—mere fact that it was drawn by lawyer of another State insufficient to show contrary intent, 128 C 393

Supreme Court cannot make will for testatrix, 129 C 145

§ 11. —Intention Generally

intent of testator to govern, if consistent with rules of law, 1 R 332

—the cardinal rule, 2 R 194, 2 D 350, 1 C 39, 6 C 305, 9 C 125, 11 C 144

intent to be gathered from words of will, 1 R 332

—and from the whole will, 6 C 34, 38 C 101 wills must be construed by intent of testator at time of making them, 6 C 305

when inconsistent, the general prevails over the particular intent, 10 C 448

all parts of will to have effect if possible, 15 C 473, 21 C 625

general prevailing intent to be carried out, 22 C 377

all rules yield to testator's intent gathered from the will, 39 C 217

intentions contrary to expressions are not allowable, 51 C 438

intention to be gathered not alone from language, but partly from circumstances and condition of family and condition of estate, 55 C 240

two methods of construing; by intent of testator, or by applying legal rules to language used, 56 C 318

the intention of the testator is committed by the law to the written language of the will, 59 C 456

—may be aided by surrounding circumstances, but cannot be shown by extrinsic evidence, 59 C 456

intention, positive and direct, rather than negative and consequential, controls, 62 C 141

—intent inferred from consequences of an express provision, where language is free from doubt, will not affect construction, 62 C 142

—or nullify rule of law applicable to express bequest, 62 C 142

implied intent to disinherit nearer relatives cannot prevent the application of rule as to lapses, 62 C 142

as between general and particular intent, 64 C 496, 66 C 141, 71 C 286, 74 C 228, 77 C 706, 80 C 29, 84 C 544, 86 C 96

—vague concluding clause will not defeat general scheme, 64 C 496

intent to be read in light of surrounding circumstances, 65 C 495, 71 C 528, 81 C 34, 87 C 175, 88 C 298, 91 C 630, 94 C 427

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—if sufficiently expressed and lawful, 65 C 495, 81 C 181, 84 C 391, 94 C 427

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- though intestacy result; but this is avoided, if possible, 67 C 249
- no fixed rules are possible, 68 C 207
- to be construed in view of legal principles testator probably had in mind, 79 C 638, 83 C 535
- repugnant provisions construed so as to maintain intention of testator, 83 C 655, 100 C 26, 109 C 170
- intention of testator is governing principle; must prevail unless contrary to law, 83 C 655, 84 C 391, 87 C 175, 663, 88 C 387, 404
- no rule of construction will defeat testator's intentions, 88 C 387, 404
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- artificial rules of interpretation of no effect if testator's intent is clear, 91 C 630
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- effect of declared intent to make a complete disposition of property, 93 C 69
- intent to be read in light of context and surrounding circumstances, 93 C 311
- court should put itself in place of testator, 93 C 311, 96 C 108
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- whole will to be read together and construed in light of circumstances probably known to testator, 96 C 67, 103 C 59, 106 C 179, 107 C 716
- as our statute of adoption, 96 C 61
- general plan of will regarded, 96 C 69, 97 C 102
- intent of testator governs in absence of use of technical terms, 98 C 102
- general residuary clause evinces intent to avoid partial intestacy, 98 C 263, 106 C 142
- question is, meaning of will as made, not making of more desirable or just disposition, 98 C 322
- hopes and desires of testator not to be confused with the expression of his formal, legal intent, 99 C 599
- tendency of testators to use more words than are necessary to express intent considered, 99 C 630
- intention of testator controls, provided it does not contravene rules of law as to nature of estate created, 99 C 650, 111 C 122
- construction must begin with ascertainment of testator's intent and end by carrying it into effect, 100 C 335
- intent of testator the primary rule of construction, 100 C 359, 103 C 59, 213, 105 C 57, 744, 106 C 178
- but it is intent as expressed, 103 C 213
- rule of construction is a device for securing uniformity of decision and for giving effect to probable intent of testator where actual intent not sufficiently indicated, 101 C 364
- rules of construction are designed as aids to discovery of intention and are the growth of a long and broad experience arising out of the considered construction of many wills, 101 C 485
- where testator made a mistake as to the actual existence of certain circumstances, the question is was the actual situation within his intent, 102 C 503
- gift in trust, principal to be paid to daughter in event of her marriage, where daughter, unknown to testator, was already married, 102 C 503
- where will contains other important provisions residuary clause not ordinarily regarded as primary and principal factor determinative of intent, 103 C 310
- an invalid provision may be effectual to show intent of testator, 103 C 331
- in determining intent of testator to execute power, inquiry is as to situation when will was drawn, 105 C 58
- testator's relations, intimacies, etc., with all interested parties, to be considered in determining his intent, 105 C 98
- considerations regarded in attempt to arrive at testator's intent, 105 C 102
- presumption that woman of any age may bear children has no bearing on testamentary intent, 105 C 745
- presumption as to intent yields to actual intent clearly disclosed, 105 C 750
- law cannot supply partial lack of expressed intent by making gratuitous assumptions, 106 C 76
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- not void for uncertainty where intent can be discerned, 109 C 567
- real question in determining intent is not what testator meant to say but what he meant by what he said, 111 C 122, 123 C 556
- that testator knew terms of our statute of adoption will not be assumed to show his intent, but must be proved as fact in case, 111 C 683
- circumstances altering value of gift will not justify disregarding clear intent, 112 C 487

—nor will belief of court that another disposition would better serve interest of beneficiaries, 112 C 487

—court cannot pass on wisdom of provisions, but must carry out intent, 112 C 487

tendency toward relaxation of absolute rules where intent of testator can only thus be made effectual, 114 C 157

intention should govern construction and is to be sought in language used, in light of surrounding circumstances, 114 C 158, 117 C 329, 120 C 31

the pole star of testamentary interpretation is the intent of the testator, 115 C 272

literal meaning of words not necessarily conclusive and latter cannot prevail over plainly indicated intent, 115 C 274

testator's intent to be determined by language used and circumstances then existing, with no attempt to provide for changes in circumstances then unanticipated, 120 C 126

—such subsequent events cannot affect construction of will, 120 C 127

will to be read as whole; if it discloses underlying intent, that is to be considered in determining meaning of particular language, 123 C 550

—this at times requires that narrower interpretation be given certain words than they import in their broad significance, 123 C 550

—principle takes on added force as applied to trust for charitable use, 123 C 550

that result which actually has come about is different from that which testatrix would have provided for had she realized amount of estate she would leave, not sufficient reason to supply intent contrary to accepted rule of law which is applicable, 124 C 589

where future events do not accord with probable anticipations of testator, eventualities must be adapted to the terms of the instrument, not the instrument to the events, 125 C 646

courts lean to construction which will carry out manifest intent of testator to divide estate equally among family, 125 C 659

court confined to intent which finds expression in wording of the will, 127 C 264

presumptions of intent are merely aids to construction which cannot prevail over an intent fairly deducible from terms of will read in light of circumstances, 127 C 474

if particular intent and general intent are inconsistent, latter will be given effect if will permits, 127 C 665

effect must be given to intention expressed in will, 129 C 351

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two methods of construing; by intent of testator, or by applying legal rules to language used, 56 C 318

"and" held not to mean "or" unless clearly so intended, 57 C 24

testator presumed to use words according to their strict and primary acceptation, 60 C 500

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—thus in gift of house and lot "to my wife during her natural life, all cash in bank

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- where a word is twice used in one sense, it is evidence of intent to give it the same meaning elsewhere, 103 C 54
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- paragraphs and punctuation, while not to be disregarded, should not be allowed to obscure real intent, 113 C 316
- where law is handiwork of someone unskilled in law, too great emphasis not to be placed on precise construction of phraseology, 118 C 605
- problem is to give effect to expressed intent in light of circumstances, if not contrary to some principle of law, 118 C 605
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§ 13. —Imperative or Precatory Words

- clause in will that testator would like his estate kept in a certain place and as it was at his death is but the expression of a desire and does not impose any duty to respect it, 73 C 56
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- expressing wish and desire that husband would leave property to children does not make disposition of property mandatory, 91 C 663
- precatory words cannot cut down an absolute estate given in earlier part of will, 98 C 102
- "wish" or "request" that old employee be retained, *held* merely precatory, 105 C 261
- provision that office "shall be maintained" on property, *held* mandatory, 105 C 261
- expressions of recommendation or desire used with reference to disposition of testator's own property, without intervention of any act of first donee, are imperative and testamentary, 112 C 569
- provision after gift of residue, that on wife's remarriage, testator desired certain disposition of his property, gives her only defeasible fee, 112 C 569
- whatever remains unexpended at decease of wife "I wish to be divided" among nephews

and nieces *held* testamentary and imperative not precatory, 117 C 489

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§ 14. —Time from Which Will Speaks; After-acquired Property

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—devise of personal property generally carries all testator had at time of death, 21 C 553, 623

—fact that testatrix had no personal property when she executed will makes no difference, 21 C 553

—when gifts to classes, only persons are included who answer description at death of testator, 21 C 623

—irrespective of those to whom description was applicable at date of will but who died before testator, 21 C 623

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it is not always true that will speaks from death of testator, 51 C 382

—should accord with manifest intent as disclosed by will, 51 C 382

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estate presumed to vest when will becomes operative unless there is a clear manifestation of contrary intent, 57 C 295, 112 C 104, 216

gift to "family" of third party; will speaks from death and children unborn at that time do not share, 69 C 416

"surviving" *held* to refer to testator's death, 71 C 453

gift dates from day will speaks, at death of testatrix, though enjoyment is deferred, 73 C 64

all property passes by will, even after-acquired, unless affirmative intent to the contrary appears, 86 C 90

whether will speaks as of death of testator or life tenant is determined by its whole purport and circumstances, 86 C 610

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ordinarily will speaks as of testator's death and members of class to be determined as of that time, 106 C 178

a will speaks from death and conveys real estate then owned, 113 C 271

—this would include property devised to testator by brother who died a few days before him, 113 C 271

in absence of any indicated intent, will presumed to speak from death, 113 C 618

—but where testator refers to actual existing state of things, reference is to date of will, 113 C 618

—gift by testator of certain number of shares of stock in corporation construed to apply to stock he owned when will was made, disregarding other stock subsequently bought, 113 C 618

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§ 15. —Presumptions; Preferred Constructions

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—but this rule aids rather than governs construction, 62 C 499

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—shown only by vesting estate elsewhere, 37 C 429

construction resulting in a partial intestacy to be avoided, 52 C 563, 57 C 553, 99 C 647, 106 C 142

testator presumed to intend to dispose of all his property and not die intestate as to any part, 54 C 470, 55 C 256, 81 C 186, 91 C 246

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it will not be presumed that a testator intended to make any disposition of his estate in violation of law, 63 C 136, 73 C 114, 124 C 452

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—next of kin favored over distant heirs, 91 C 637

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estate vested in accordance with construction finding reasonable support in language of will, avoiding Statute against Perpetuities, and accomplishing fair and impartial results, 83 C 370

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only where two constructions are equally consistent with real intent will rule that words are to be construed to uphold will be adopted, 97 C 246

when bequest is given for charitable use for named purposes and restricted by named conditions, and later legatee is given the whole or an aliquot part of residue, presumption residue is subject to same purposes, uses and conditions as earlier bequest, 98 C 322

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—intent sought is that shown by words applied to subject matter and surrounding circumstances, not one unexpressed or based on assumption as to testator's wishes, 107 C 409

—when intent ascertained, obvious mistake, such as incorrect name or misdescription, will not defeat it, 107 C 409

—knowledge of laws of descent not imputed to laymen as it would be to lawyer, 107 C 409

—bequest to be upheld if legally possible, 107 C 415

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—in such case meaning will be attached to language which testator attached to it when he used it, 120 C 97

presence of general residuary clause shows intent to avoid partial intestacy; in case of doubt provision of will to be interpreted so as to avoid it, 121 C 526

ground on which rest rules of interpretation that heirs are not to be cut off by doubtful implication and that distribution of estate

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§ 16. —Extrinsic Evidence

parol, of instructions to scrivener, inadmissible to vary will, 6 C 34

parol, of testator's intention, inadmissible to vary terms of will, 6 C 274

parol evidence admissible to explain latent ambiguity, 16 C 1, 302

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—bequest of debts; other evidence of debt not referred to in will *held* inadmissible, 32 C 482

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—parol, that testator spoke of such note as son's note, inadmissible, 46 C 237

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—but the intention committed by the law to the written language of the will may be aided by surrounding circumstances, 59 C 471

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demurrer, based on construction of will disregarding extrinsic evidence which is admissible, fails, 75 C 285

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is admissible to rebut resulting trust when, 77 C 605

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—use of term “personal estate” *held* not to disclose unmistakably testator’s intent, 96 C 112

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—language of will *held* to preclude any latent ambiguity or equivocation, 98 C 526

extrinsic evidence admissible to prove origin of debt directed to be paid, 101 C 699

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—“personal estate” construed, 103 C 214

—may be ambiguous as to just what personal estate is intended but cannot include real estate, 103 C 214

—hence proof of an intent to include such estate not proper, 103 C 214

parol evidence cannot supply possible defect or omission occurring by mistake or inadvertence of scrivener of testator, 103 C 214

—nor can it force language beyond what might be embraced in it, 103 C 220

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—may not show intent contrary to will or interpolate one not justified by language used, 105 C 57, 121 C 682

—as applied to question whether will exercised power of appointment which testator had, 105 C 58

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§ 17. Description of Property; Certainty

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exception as to one piece of property, 82 C 159
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"interest and shares" in a company means right of property and stock certificates, not claims against the company, 89 C 690
"I give to — \$5, having already deeded to her my house, and a mortgage in Bethany of \$2,500"; *held*, only gift was \$5, 91 C 45
mistake in description of subject matter not important if it can be identified, 91 C 46
no testamentary gift if no money or property designated as subject matter, 93 C 69
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testatrix devised real estate "standing in name of my husband's estate," which had already been transferred to her by certificate of descent; *held* sufficiently identified, 107 C 409
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§ 18. Designation and Description of Beneficiaries

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§ 19. —In General; Certainty

devise "to most needy of our brothers and sisters," *held* not void for uncertainty, 8 C 48

devise may be by description as well as by name, 15 C 274

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what description of devisee sufficient, 15 C 293

—parol admissible to explain latent ambiguity in will, 15 C 293

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—*id* certum est quod certum reddi potest, 51 C 379

bequest of certain sum in trust, to be applied, principal and income, as beneficiaries needed assistance, *held* sufficiently certain, 57 C 147

—beneficiaries *held* to be those who would take under Statute of Distributions, 57 C 147

—class *held* to consist of persons living at death of testator, 57 C 147

legatee described and not named; parol evidence admissible to show which of the devisees answering description was intended to take, 60 C 472

—finding of lower court upon that point is not subject to review, 60 C 472

no rule requires the name of devisee to be mentioned, 60 C 476

—but description of devisee should denote person intended and distinguish him from all others, 60 C 476

"legatees named" *held* to include persons who were to receive bequests whether designated by name or as members of a class, 70 C 44

"to the legal heirs of my brother John's children" *held* to mean heirs of my brother, John's children, 70 C 467

legacy to institution by name which did not exist; institution with similar name may take on proof it was one intended, 73 C 671

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"in the same manner" *held* not to determine legatees, 78 C 511, 88 C 286

use of word "between" instead of "among" lawful heirs does not designate two particular children living to the exclusion of possible future issue, 89 C 215

language of will may create gift by implication, but it must be clear; no such gift in this case, 89 C 690

"all" *held* to be used in its primary sense and not to mean "any," 103 C 308

"domestic servants" has varied meaning, depending on particular intent, 106 C 236

—expression defined as regards ordinary meaning, 106 C 236

—*held* to include gardener on large estate, 106 C 236

gift to "my two sons" without naming them, where testator had three, was made definite by later provisions clearly excluding one from participating in estate, 109 C 566

provision that if estate is more than sufficient to meet bequests at expiration of life estate, excess will be divided among the above named legatees, applies only to those who are given personal property, 113 C 618

—does not apply to life tenant, 113 C 635

—nor to definite bequest to cemetery association, 113 C 635

—does include gifts of notes, 113 C 635

where residue is given to be distributed according to the laws of distribution at death of life tenant, ordinarily life tenant is not excluded, 115 C 269

—but rule not applied where testator gave wife one-half of his estate and life use of other half, the latter half to be distributed at her death according to the statutes of distribution, 115 C 269

that no husband of either daughter should have any control of any of the property; indication of intent that no part of estate should go out of line of blood relationship, 117 C 327

where gift was to "such charitable, benevolent," etc. institutions as executors may determine, improper to form corporation composed of executors and other persons who might be constituted members under its by-laws to select the beneficiaries, 128 C 638

§ 20. —Children

See also § 25, *infra*

"children of my two sisters in France," applicable only to children of surviving sisters, 35 C 109

distinction between "children" and "heirs" is generally of no importance, and there is no rule on the subject in this State, 55 C 158

gift of remainder to children born to life legatees, *held* not a gift to heirs of testatrix generally, 57 C 553

gift of income under trust to children "and their heirs forever"; *held* gift to heirs of children who die, 76 C 522

"children" primarily does not include remoter descendants, 83 C 12

"heirs" and "children" used in common speech are synonymous, 84 C 392, 90 C 145

gift to children *held* to include illegitimate children, 88 C 270, 282

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"children" apparently used in strict sense, 93 C 308

where gift is made to child of testator's child, presumption is, that one of testator's own blood is intended, not an adopted child, 96 C 61

"issue" means "children" when the two terms used interchangeably, 103 C 308, 105 C 744
gift over to children of testator's sisters *held* to include adopted daughter, 105 C 745

word "children" does not include one who died before execution of will, 108 C 100

—but where gift over was made to "children and the issue of any deceased child," children of one dying before execution of will are included in issue, 108 C 100

—widow of son not included in issue, 108 C 100

"child or children" as including adopted child, 111 C 1

—particularly where this agrees with general plan of will and testatrix knew of and approved adoption, 111 C 1

—but adopted child *held* not included in "lawful heirs" where this phrase was repetition from will under which testatrix received property, 111 C 1

child as meaning descendants of first degree, 111 C 6

gift over to children of life tenant *held* not to include grandchild of life tenant dying before her, 112 C 104

word "children" has definite and generally accepted primary meaning of descendants in first degree, 127 C 261

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§ 21. —Cousins

will distributed residue to next of kin on both paternal and maternal sides including both first and second cousins, per capita, 120 C 97

—primarily "cousin" means child of uncle or aunt, 120 C 97

—children of first cousins are second cousins to each other; children of one's first cousins are his first cousins once removed, popularly called his second cousins, 120 C 97

—in absence of contrary context, it is to be assumed testator used these terms in popular sense, rather than with reference to methods of computation by degrees of consanguinity, applicable to title by descent, 120 C 97

—so children of second cousins, i. e., second cousins once removed, *held* not entitled to participate, 120 C 98

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children of cousins of testator's uncles and aunts, 120 C 111

§ 22. —Executors

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gift to "executors hereinafter appointed"; executor substituted by codicil takes to exclusion of executor removed, 33 C 270
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§ 23. —Family

trust funds "for support of family of A"; only those living with and legally dependent on A, are entitled, 37 C 384

"family" signifies persons who live in one house and under one domestic government, 63 C 324

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—so in disposition of house "when no longer occupied by any member of my family," term "my family" did not include son living apart, 63 C 325

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meaning of "family" determined by context, 66 C 401, 69 C 416, 80 C 29, 83 C 369, 93 C 425

gift to "family" of third party; will speaks from death and children unborn at that time do not share, 69 C 416

widow as member of, 71 C 452, 83 C 371

family *held* dissolved by death of its head, 78 C 510

"family" means those who are distributees of deceased children's estate; widow of deceased child takes in absence of lineal descendants, 83 C 370

—surviving widows and husbands of those whose right to annuity was substitutionary excluded in that capacity, 83 C 370

—takers of deceased child's share include widows and surviving husbands as well as heirs, 83 C 371

§ 24. —Heirs

§ 24(1). In General

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word "heirs" to have the ordinary settled meaning, unless contrary intent clearly appears, 48 C 293

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"heirs" *held* to mean children, 55 C 256

"heirs" *held* to be a word of purchase and not of limitation, 60 C 499, 73 C 63

"heirs" in its primary meaning expresses relation of persons to a deceased ancestor, 60 C 500

—this meaning will be given unless context clearly shows it was used in a different sense, 60 C 500

"heirs" in gift over of remainder, *held* used in ordinary sense and not to mean children, 61 C 14

"legal heirs" *held* to mean children, 65 C 46

"heirs at law" *held* to mean those who are such at testator's death, 65 C 512

gift to A, "his heirs and assigns"; latter are words of limitation, 67 C 249

gift to "legal heirs" of M, who was living; children and representatives of deceased children thus described take per stirpes, 67 C 254, 70 C 44, 467

meaning of words "heirs," "legal heirs," etc., 70 C 44, 71 C 469, 74 C 228, 78 C 485, 79 C 617, 82 C 159, 83 C 5, 342, 376

—in Massachusetts, 64 C 248

gift, in case testator survived beneficiaries, to "their or each of their heirs"; "heirs" used as to personalty, 70 C 44

"heirs" does not include widow or widower, 70 C 44, 83 C 370

"my legal heirs" excludes wife's heirs, 77 C 176

in view of context and to avoid perpetuity, "heirs at law" *held* equivalent to "wives and children," 81 C 181

leaving property to one's heirs or issue of her body begotten is the same thing as leaving it to her issue; read in light of the context, 82 C 158

legal heirs are those who would take real estate in the absence of a will; determined at death of testator, not of life tenant, 82 C 159

"heirs," "heirs of the body," "issue," and issue of the body" mean more than immediate issue, 82 C 164

"heirs, administrators, and assigns," words of limitation, not purchase, to save a remainder otherwise void as too remote, 83 C 12

leaving property to legal heirs according to law of distribution; Statute of Distributions governs, 83 C 342

—children of deceased first cousins cannot take estates their parents would if living, 83 C 342

"heirs" means those who in the absence of a will would inherit real estate, unless the language indicates otherwise, 83 C 345, 376, 530, 87 C 518, 89 C 214

one's "own heirs" *held* to mean next of kin excluding one who was to be a life tenant, 83 C 530

"heirs" usually given its strict primary meaning unless the contrary appears, 84 C 256, 86 C 610, 89 C 214

"heirs" *held* to be taken in primary sense and not to include husband, 84 C 256

to G's heirs in three equal portions; where G had four children, one unknown to testator, bequest vested in all four, 84 C 391

"heirs" and "children" used in common speech are synonymous, 84 C 392, 90 C 145

"heirs at law" those who take real property at death of testator, 86 C 610

where one heir is named as life tenant and gift over to "heirs of testator" on her death, she is excluded, 86 C 610

"heirs" are those entitled to inherit from intestate, 87 C 359, 89 C 214

ignorance of testator does not change rule that "lawful heirs" should be given the primary meaning, 89 C 214

"lawful heirs" refers to heirs generally and therefore remainder to them *held* void under old Statute against Perpetuities, 89 C 214

"heirs" no longer has technical meaning; *held* to mean wives and widows of two sons, and grandchild, 92 C 408

"heirs" will not be given meaning of children unless such an intent reasonably appears, 97 C 246

—as meaning issue, 97 C 246

gift to five children and upon death of all, to their respective "heirs," 98 C 821

—upon decease of a son intestate and childless in 1923, *held* that his widow took her husband's interest as "heir," 98 C 821

—subject to trustee's possession during continuance of trust, 98 C 821

"heirs" not used technically, but to designate takers of intestate estate under our Statute of Distributions, 98 C 821

a gift to "heirs at law" gives a preference to sister of full blood over sisters of half blood, 100 C 332

unless intent to use "heirs at law" in its technical sense is apparent no occasion longer to make such a claim, 100 C 332

life use to daughter with remainder to testator's heirs at law, 100 C 332

—"heirs at law" are those who would take realty and personalty under Statute of Distributions, unless contrary intent clearly appears, 100 C 332

—daughter obviously excluded as heir at law, 100 C 332

—intention clear that fund should not become intestate estate on death of daughter, 100 C 332

"heirs" or "lawful heirs" means primarily legal inheritors of real estate; but it may mean children, next of kin, or distributees of personalty, 105 C 98

basis of rule that "heirs" means primarily those entitled to inherit real estate, 106 C 179

—not applicable here, 106 C 179

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- means those who would take under Statute of Distributions, 106 C 179
- hence includes husband or wife who now takes directly under statute, not by virtue of right of dower or curtesy originating in marriage, 106 C 179
- status of one as heir not affected by change in law as to extent of his participation in intestate estate, 106 C 190
- provision that heirs of any predeceasing legatee or devisee should take, construed, 108 C 100
- adopted child *held* not included in “lawful heirs” where this phrase was repetition from will under which testatrix received property, 111 C 1
- the words “legal heirs” mean those entitled to inherit under Statute of Distributions, 115 C 239
- they include grandnieces and grandnephews as well as nieces and nephews under provision in statute that brothers and sisters and those who represent them shall inherit, 115 C 239
- in absence of clear intent, life tenant who is also heir cannot be excluded from share in remainder interest to be distributed according to statute, 115 C 269

§ 24(2). Time of Ascertaining

- “on decease of A then to my heirs at law”; time when “heirs” to be ascertained, 48 C 293
- if ascertained at legatee’s death, bequest *held* void as a perpetuity, 48 C 293
- legal heirs are those who would take in the absence of a will and are determined at death of testator, not of life tenant, 82 C 159
- gift of life use with power of appointment “to my legal heirs” means those who were such at life tenant’s death, 83 C 5
- beneficiaries more remote than testator’s grandchildren, not included, 83 C 12
- will gave fund in trust for A, B and C for life, then over; A died, and a codicil gave the fund to “heirs of A, B and her heirs, C and her heirs” upon same terms as trust in the will; *held* children of A took same estate A would have had had she survived testator, 83 C 11
- heirs determined as of date of testator’s death so as not to offend Statute against Perpetuities, 83 C 530, 87 C 359, 522
- gift over to testator’s heirs on death of last survivor of three life tenants; they take at survivor’s death, 84 C 689
- who are heirs and what share they take is governed by the law in existence at date of distribution, 84 C 690
- gift over to heirs-at-law of life tenant; will *held* to speak as of life tenant’s death, 85 C 134

- a devisee, who dies before title vests in her, is excluded in determining heirs-at-law, 86 C 610
- heirs-at-law are determined at death of testator, 86 C 610
- “then living lawful heirs” means heirs living at testator’s death who might be living at life tenant’s death; does not violate old Statute against Perpetuities, 87 C 359
- “heirs at law” dying without issue means those at testator’s death, 87 C 518
- who are “heirs” of a person can only be determined at his death, 98 C 826, 106 C 179
- gift over to “heirs of the blood of my father” means those answering description at testator’s death, 105 C 261
- that two of them also are annuitants under trust which is immediate gift, *held* immaterial, 105 C 261
- status of “heir” may be fixed as of one date; extent of participation fixed as of another, 106 C 189
- subject to intent to contrary appearing, next of kin and heirs at law determined at death of testator, 114 C 152
- “legal heirs” designates class, members of which are determined as of date of testator’s death, 115 C 239

§ 25. —Issue

- “issue” means surviving issue, 72 C 29, 78 C 362
- of any degree, 81 C 34
- “issue” *held* equivalent to children, 73 C 303, 83 C 664, 96 C 91
- to mean descendants of every degree, 81 C 34, 82 C 158, 86 C 217, 88 C 287, 89 C 270
- issue as a word of purchase, 76 C 189
- “living issue” *held* equivalent to surviving issue, 78 C 362
- gift in trust for daughter for life, then to her issue, with gift over should she die without any; issue *held* to mean descendants of every degree, 81 C 34
- “issue” not word of limitation where such trust is active and life tenant can only appoint among her issue at her death, 81 C 34
- that testator was sixty-nine years old and life tenant was thirteen and will provided for her death before him, leaving issue, or that remainder was finally to be divided among such issue, *held* no reason to interpret it as meaning children, 81 C 34
- leaving property to one’s heirs or issue of her body begotten is the same thing as leaving it to her issue; read in light of the context, 82 C 158
- “heirs,” “heirs of the body,” “issue,” and “issue of the body” mean more than immediate issue, 82 C 164

"issue," as a word of purchase, means primarily descendants of every degree but may mean children only, 82 C 164, 89 C 270

issue and descendants comprehend more than immediate issue, 84 C 391

"issue" means descendants more remote than children, 86 C 217

issue *held* to mean indefinite issue including illegitimate, 88 C 287, 290

gift to "legal issue" construed to mean children; *held* to vest immediately on death of testatrix although right of enjoyment postponed twenty-five years, 89 C 270

"issue" ordinarily construed as word of purchase, not limitation, 96 C 61, 103 C 122

—means descendants of every degree, 96 C 61

—construed to mean children, 96 C 62

"issue" or "lawful issue," unless limited by context, construed as a word of purchase, 98 C 337, 110 C 117

—thus including descendants in every degree, 98 C 337

—such descendants will take per stirpes unless will directs otherwise, 98 C 337

—such construction fortified by testator's expressed preference, 98 C 337

"issue" primarily means descendants of every degree, 103 C 54

—but will be interpreted as children where intent to so use it appears, 103 C 54

—as where in two other places in will it is clearly used in that sense, 103 C 122

use of word "issue" in connection with "parent" indicates meaning of children, 103 C 122

—where used interchangeably with grandchildren will be given that meaning, 103 C 122

—particularly to avoid Statute against Perpetuities, 103 C 122

"issue" means "children" when the two terms used interchangeably, 103 C 308, 105 C 744

"issue" ordinarily a word of purchase and means descendants of every degree, 106 C 514

—but context and circumstances may give it meaning of children or grandchildren, 106 C 514

word "children" does not include one who died before execution of will, 108 C 100

—but where gift over was made to "children and the issue of any deceased child," children of one dying before execution of will are included in issue, 108 C 100

—widow of son not included in issue, 108 C 100

"issue" to be given primary meaning, heirs of the body, including descendants of every degree, in absence of contrary intent, 110 C 150, 111 C 6

—but does not include son where father is living, 110 C 150

"issue" when used as word of purchase and unaffected by circumstances showing different intent means descendants of every degree, 124 C 286

—under rule of interpretation originating in England and followed somewhat here, when used in correlation with "parent" or the like is taken to mean children, 124 C 286

—growing tendency to regard fact that word is so used as circumstance merely, not as definite rule of interpretation, 124 C 286

if brother or sister were not living at death of life tenant then "the issue, then living, of my said sister, shall take the share to which their mother would have been entitled had she been living," *held* to include children of deceased child of sister, 124 C 286

word "issue" used as one of purchase and where circumstances show no different intent, means descendants of every degree, 124 C 448

—words cannot be given other meaning merely to avoid Statute against Perpetuities, 124 C 448

issue means primarily descendants in any degree, 127 C 6

"issue" primarily signifies descendants of the body; does not include adopted child unless circumstances indicate testator so intended, 127 C 469

—use in will of words "parent" and "father" in connection with "issue" is insufficient of itself to give it meaning of "children," 127 C 472

§ 26. —Legal or Personal Representatives

"legal representatives" means those who would take under Statute of Distributions, 53 C 262, 83 C 380

—includes widows and widowers, 83 C 380

bequest to children with provision that one-fifth of the share of each should be invested and "go to his personal representatives who would be entitled to his personal estate according to law"; *held* widow of son did not take as his personal representative, 55 C 319

"personal representatives" in will *held* to mean next of kin, 55 C 319

—and not executor who was sole devisee or legatee, 55 C 324

"legal representatives" of sons construed to mean executors and administrators, 63 C 278

gift of remainder to children and "legal representatives of any who may then have deceased"; words quoted are of limitation and equal executors and administrators, 65 C 492

§ 26 Wills

context determines meaning, 65 C 492, 71 C 288, 80 C 29, 83 C 345

legal representative *held* to mean lineal descendants, 71 C 288

meaning of "representatives," "legal representatives," etc., 73 C 106, 74 C 228, 516, 77 C 176, 310

to sustain validity of clause, "legal representatives" *held* to refer to time of testator's death, 73 C 106, 83 C 381

gift to children and legal representatives of any deceased child at end of ten-year period includes whom, 83 C 370

"legal representatives" and "personal representatives" mean executors or administrators, in matters of distribution, 84 C 324

"such of his [H's] legal representatives as are related to me by blood" means H's heirs-at-law, not executors or administrators, 85 C 135

—refers to those who were such at H's death, not testatrix', 85 C 135

"representatives" means heirs or next of kin, 85 C 177

"representatives," "legal representatives," "personal representatives" depend for their meaning on intention of testator; no precise meaning, 90 C 685, 105 C 98

"representatives" means lineal descendants, not husband of niece, nor administrator of nephew, 90 C 685

"legal representatives" has no definite meaning as used in wills, but interpreted according to context and discoverable intent, 120 C 477

—may mean those entitled to take by inheritance, 120 C 477

—or representatives of estate of deceased persons, i. e., executors or administrators and thus in effect words of limitation, 120 C 477

—or may mean children or lineal descendants, 120 C 477

§ 27. —Nephews and Nieces

bequest to nephews and nieces for "collegiate and theological" education, *held* to include grandnephews and grandnieces, 57 C 25

—but bequest *held* not to have retrospective operation, 57 C 25

"surviving nieces" *held* to mean survivors of nieces named to exclusion of others, 111 C 120

no intent shown to change beneficiary to grandnephew E. C. W. from "my nephew" E. C. W. by republication of will by codicil after latter's death, 124 C 577

§ 28. —Next of Kin; Lineal Descendants; Relatives

"next of kin" defined, 55 C 327

widow *held* not to be next of kin, 55 C 328
relatives, 82 C 315, 90 C 529

next of kin ordinarily means those entitled under Statute of Distributions, 97 C 102

"lineal descendants" means primarily those who inherit by blood; but it may mean children, 105 C 109

"lineal descendants" and "nearest of kin" primarily import relationship by blood, 111 C 683

—hence will not include adopted child unless such intent appears, 111 C 683

—it will not be presumed on assumption of knowledge of our law of adoption, which must be proved as fact in case, 111 C 683

—situation is different where testator is adopting parent from where he is a stranger to adoption which took place years after will was made, 111 C 687

that life tenants are also next of kin does not necessarily exclude them, 114 C 152

—but where gift over was made "upon the death" of life tenants when trust for them was to terminate and testator "then" gave property over, life tenant was excluded, 114 C 152

—and next of kin were to be determined as of termination of life estate, 114 C 152

—hence deceased niece and nephew not included, 114 C 152

—this intent emphasized by gift over "to my next of kin with the exception of my niece L," 114 C 152

subject to intent to contrary appearing, next of kin and heirs-at-law determined at death of testator, 114 C 152

life use in third to each of three children, on death of child that part to go to lineal descendants or "nearest of kin"; *held* latter phrase connoted blood relationship; sister, not widow, of deceased child "nearest of kin," 117 C 327

—further clause directing homestead be not sold but go after death of son E to "their lineal descendants" or if none "to the nearest of kin"; *held* testator's daughter surviving after E's death took life use and her children fee to homestead, 117 C 327

next of kin may mean either nearest blood relatives or those entitled to take under statutory distribution of intestate estates, 120 C 97

—in absence of qualifying words, it is to be construed as intending those who fall within designation in general speech and understanding of men, rather than nearest of blood, 120 C 97

—a construction which admits children to compete with their living parents is to be avoided unless such was plainly testator's intent, 120 C 97

—so first cousin who is still alive participates but her child is disentitled, though children of deceased first cousins participate, 120 C 97

§ 29. —Wife; Widow

bequest to "my wife" in lieu of dower; divorce by husband; bequest *held* not conditional on her remaining wife of testator, 48 C 492

bequest to "widow" of son of testator; *held* the wife then living was intended, not any future wife, 61 C 14

"to his wife," in gift in remainder, refers to wife in existence at date of will, 73 C 57

"wives" of children *held* to mean those who were such at testator's death, 81 C 181

gift in trust for wife of son after his death *held* to mean his second wife where he had been divorced and remarried, 110 C 117

gift to "wife of my said son" upon his death referred to wife he had when will was made and testator died, and gifts over upon her death did not violate rule against perpetuities, 127 C 655

§ 30. Interests Created; Nature and Incidents

§ 31. —Fee Simple or Absolute Estates

devise to A and heirs male forever creates fee in A's sons, K 175

word "heirs" not required to pass a fee, 1 R 341, 4 D 368

devise to A of land, also homestead for life; *held* A took fee in first devise, 1 D 10

—parol evidence of different intent *held* inadmissible, 1 D 8

after general devise in fee, explanatory words that life use only is intended, *held* inoperative, 1 D 299

devise of use to wife until majority of son, then to son, vests fee immediately in son, subject to personal trust in mother, 2 D 338

under facts *held* estate in fee was created in executors, but that it was not absolute but upon condition that they should perform directions of testator, 7 C 204

devise, with instructions to pay a gross sum out of it, creates a fee, in absence of other words, 7 C 205

"one-third of the use of farm, together with the stock," creates an absolute estate in the stock, 15 C 274

use of realty to daughter as long as she remains single and her mother lives; at death of mother avails, if land sold, go to daughter; if power of sale is not exercised the fee is in daughter, 15 C 469

devise to A in trust for B and her heirs, for sole use of B and her heirs, creates an equitable fee in B; such equitable fee is devisable, 26 C 4

devisee of life estate with power to sell at discretion and for his own use takes a fee, 34 C 404

devise to daughters "meaning their children shall become heirs to property," *held* a fee in daughters, 37 C 429

absolute interest in personalty *held* not varied by later clause, when, 38 C 99

bequest of personal property to widow; "if any remain at her decease" to go to children; *held* a fee in widow and gift over inconsistent and void, 41 C 607

"all my property to A absolutely and in fee, subject to following trusts"; *held* A took a fee for his own benefit, subject to the trusts, 42 C 285

"residue to M and her heirs, to her sole use, to go to her children at her death," creates fee in M, 45 C 422

gift or devise generally, with power of sale and no limitation, carries a fee, 46 C 455

—so also if language leaves it doubtful whether life estate or fee intended, 46 C 455

devise in fee subject to burden of paying over income; *held* devisee took not strictly as trustee but individually, 51 C 210

—by accepting will he accepts the burdens, 51 C 210

—if income be withheld assumpsit lies by legatee thereof, 51 C 211

bequest of use of personalty, without any disposition of the corpus, may be regarded as a bequest of the property itself, 51 C 435

—but will should manifest intention to bequeath an absolute estate, 51 C 435

bequest to children and if they die without issue then to children of brother and sister, *held* a fee in children, 52 C 518

—gift over *held* contingent on death of children before that of testator, 52 C 518

"heirs" not necessary to create a fee if intent of testator is to pass the whole interest, 52 C 520

—intent can be gathered from other expressions, 52 C 520

"all my estate," "all my interest," "my whole remainder," etc., conveys fee simple, 52 C 520

gift of one-half of estate to wife in fee, gift of remaining one-half to wife with unrestricted power to sell "during her natural life," remainder over; *held*, "during her natural life" did not limit estate, 52 C 557

—wife has absolute power to dispose of property during her lifetime, and conveyance by her carried good title in fee, 52 C 557

—and she could dispose of property by gift, 52 C 557

devise of all the realty to wife for life; residuary clause giving her all the estate of whatever name or kind, *held* widow took a fee of all the realty under latter clause, 54 C 470

§ 31 Wills

gift of income to sons and their families; distribution to their heirs when youngest grandchild becomes of age, if "the trustee and judge of probate shall think it safe to do so"; *held* that the estate vested in fee in grandchildren at death of testator, 55 C 256

gift of all estate to children; "in event of death of either without issue, portion of deceased to go to the survivors"; *held* to mean death in lifetime of testator, and children surviving take a fee, 55 C 361

—words "share" and "portion" more applicable to a fee than to life estate, 55 C 361

fee given by apt words is not to be destroyed or diminished except by clear language, 57 C 154

gift to A with gift over "in case of death of A," *held* to mean A's death in lifetime of testator, 57 C 154, 295

—if A survives testator he takes property in fee, 57 C 154, 295

—rule *held* to vest shares in children absolutely, 57 C 295

—where they and their issue take after a life use in widow, and gift over in case of death without issue, 57 C 295

gift of residue to wife in fee with further provision that what she may not use should go to a church; *held* gift of fee exhausted entire estate and there was no remainder upon which gift could operate, 62 C 93

gift to A in will revoked by codicil, and A's share given to B in trust for A but A dying before B then to latter; B died since the testatrix; *held* A took a fee free from trust, 63 C 251

when fee will be reduced by later gifts, 67 C 394, 71 C 224, 72 C 590, 77 C 95, 80 C 673, 84 C 665, 88 C 270

gift to E, with limitation provided he die before his majority or without leaving lawful issue surviving and without having disposed of the land by will or deed; E gets fee, 68 C 274

where bequest is made in trust for E until he is twenty-one, and to continue in certain contingency, and testator survives E's twenty-first birthday and gives him an additional interest absolutely by codicil, *held* that E takes fee, 71 C 72

gift over, should donee die without issue, of entire sum or "any portion thereof remaining unexpended," did not cut gift down to life estate, 71 C 224

general intent to give fee *held* to prevail over provision as to gift over, should donee die without "any heirs," 71 C 283

gift to A, with limitation in case she die "during her minority or without issue or children afterwards"; no intention to cut down gift in fee to A to lesser estate, 72 C 590

subsequent restrictions on fee are void, 77 C 95

gift in trust to pay certain premiums, with gift of "use, improvement, income, and enjoyment," of money remaining after paying premiums constitutes absolute gift of excess income, 78 C 397

absolute estate in several donees cut down to particular estate for portion only of donees, 80 C 673

legacy in codicil most of which is conditional, *held* absolute gift, 82 C 158

what is an absolute and unconditional legacy, 82 C 158

a trust provision for life support is repugnant to a gift outright, 83 C 655

express gift in fee simple not cut down by subsequent ambiguous clause, 84 C 665

a gift to G in fee with later provision for gift over if he died without issue, *held* to be a gift in fee because gift over was ambiguous, 84 C 666

word "heir" not necessary to pass a fee, 86 C 639

gift in fee not cut down by subsequent provision less positive and direct, 88 C 270

no gift in fee by implication where wife is given a life estate, and later in the will, other property is given to another, subject to wife's life estate, 89 C 690

testamentary gift in fee not reduced by subsequent provisions that are ambiguous, 91 C 663

gift in fee not cut down by subsequent provision for disposition of "unused" estate, 91 C 663

absolute estate can only be cut down by later words of undoubted meaning, 92 C 440

provision for estate to be placed in savings bank in trust "they to have use during lifetime to be to them and their heirs forever" *held* to give absolute estate, 93 C 69

a direction that property be divided equally between two, imports an absolute gift to them, 93 C 69

absolute gift of all the income of property is a gift of the property itself, 93 C 69

repugnant conditions subsequent are unavailing to reduce absolute estate once created, 93 C 407

precatory words cannot cut down an absolute estate given in earlier part of will, 98 C 102

one may have the life use of estate and take the fee either as heir or legatee, 98 C 263

gift of house and land to wife "during her life all cash in banks or other securities"; wife *held* to take life interest in land and absolute estate in personalty, 99 C 563

gift to executors, eo nomine, "to be distributed at their discretion" vests in them an absolute and beneficial estate, 99 C 598

—unless such interpretation is precluded by other provisions of will, or is inconsistent with its general scheme and purpose, 99 C 598

—view that executors took upon a trust which was too vague to be enforced, followed in some cases, 99 C 598

—but weight of authority, especially in Connecticut, is otherwise, 99 C 598

express and positive devise in a will not to be cut down by subsequent clause unless it is equally express and positive, 99 C 647

—thus clause after gift apparently absolute that property be not mortgaged or sold but go to heirs of donees on their death, 99 C 647

—nor could this clause be construed as restraint on alienation by donee, as that would be void, 99 C 647

words of inheritance not necessary to carry a fee, 99 C 647

—“give” or “devise” sufficient, 99 C 647

gift of residue in fee to three sons, including E; then codicil putting E’s portion in trust for maintenance and support; *held* fee not reduced to life estate, 101 C 142

gift in fee not cut down to life estate by provision for distribution “at the decease” of the donee, 101 C 481

—this will be construed to mean death before testator, 101 C 481

—gift in fee can be cut down to life estate by subsequent provision only when that is as pointed and direct as original gift, 101 C 481

—gift to daughters, their heirs and assigns forever, but “at their decease if childless” property to go to others; both survived testator, never married and made wills each in favor of other; *held* survivor took whole estate, 101 C 481

an absolute gift will not be cut down by subsequent provision unless language manifest and positive as to make intention clear and definite, 101 C 529

—gift to wife of her statutory share, absolute gift of residue, then appointment of wife as executrix with provision that she, if her necessities required, might encroach on principal, gives her power over property not devised to her only during settlement of estate, 101 C 529

where gift in fee is followed by limitations this should be reconciled by applying it to death of donee before that of testator, 101 C 532

a gift over “of the avails arising from the improvement of the farm,” not gift of fee, 102 C 401

where will creates estate with definite legal incidents later attempt to curtail those incidents is void, 105 C 262

—as effort to restrain alienation of fee, 105 C 262

—but this principal does not apply to trust, 105 C 262

gift of fee not cut down by subsequent limitation unless language is clear and unambiguous, 105 C 308

—provision after gift of remainder to unmarried son that if he left a widow she should have a life estate *held* to refer to son’s death before testator’s, 105 C 308

—not likely testator intended fee to be held by son throughout his life subject to potential rights of a possible widow, 105 C 313

provision that devise in fee pass to another in event of devisee’s death, refers only to his death in testator’s lifetime, 105 C 742
absolute estate may be bequeathed, subject to provisions that it be held in trust during legatee’s life, 106 C 137

where will gave one-half residue to M absolutely and remaining half to D “to be held in trust by M and income paid” to D, *held* D had full title subject to trust during his life, 106 C 137

—words descriptive of absolute interest need not be used if intent to give it appears, 106 C 141

merger of life estate and remainder in one person, 106 C 514

absolute gift not cut down by substitutionary gift over which is invalid, 106 C 627

if devise of fee is followed by apparently inconsistent limitation, latter should be reconciled by referring it to death in testator’s lifetime, 109 C 7

—thus gift to children of E, but if any die before legacy “shall take effect,” then to his lineal descendants, 109 C 7

—such substitutionary gift would not destroy fee of children unless intention clearly appears in unambiguous language, 109 C 7

gift of use of personal property which by its nature is consumed by use creates absolute title in beneficiary, 113 C 272

life estates will not be converted into fee by reason of a power of disposition of corpus, no matter how broad, 114 C 441

absolute gift will be cut down by subsequent provisions only when lesser estate is indicated therein in unambiguous language, 125 C 421

where testator makes absolute gift he cannot thereafter create any further interests in or limitations upon it, 127 C 246

clear gift of absolute estate will not be cut down to lesser one by mere implication from later ambiguous provision, 127 C 246

language which standing alone would be sufficient to create absolute title may be re-

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stricted so as to pass lesser interest by language clearly indicating intent, 127 C 246
where there is absolute gift to one person with provision that in event of his death before a certain time another should take by executory devise or bequest, and latter gift fails, the absolute interest in first donee is unaffected and passes to his heirs, 129 C 137

—thus where gift of principal to A, but if he died before life tenant then to church society, and latter gift lapsed and A died before life tenant, A's heir took, 129 C 137

provisions in terms expressing gift to be absolute, or "to him and his heirs," not necessary to vest absolute interest, 129 C 145

—direction to "pay over" sufficient, 129 C 145

gift to husband to be his absolutely "as long as he remains unbetrothed," and in event of his betrothal he to have income during life, was absolute gift subject to a conditional limitation, 129 C 350

§ 32. —Life Estates

See also LIFE TENANT AND REMAINDERMAN
devise to three for life, and to heirs of survivor in fee; *held* share of each descends to his heirs, until all three die, 1 R 78

devise to one and heirs of his body, creates a life estate only in first devisee, 2 R 40

language *held* to create life estate in income of trust fund, 27 C 600

residue to children "after wife's death"; widow has life use of residue, 32 C 502

legacy of life interest in stock; residue in same proportion; revocation of first gift; legatee takes only life interest in residue, 33 C 270

bequest to daughter, and at her decease to her issue, and in default of them to testator's other children; *held* life estate only in daughter, 34 C 177

devise of entire use if remaining a widow; one-half in case of remarriage; *held* life estate only in widow, 41 C 371

bequest to A and at his death the amount given to go to A's children; *held* A took only a life estate, 46 C 248

there is no difference between devise of estate for life, and use for life, 46 C 454

life estate created by express words *held* not enlarged by power of sale, 46 C 456

—but intention of will conclusive, 46 C 456

—exercise of power of sale by life owner *held* to convey fee, 46 C 459

devise to daughter to be held by trustee, to pay over income and at her death to convey; *held* life estate in daughter, 47 C 349

bequest to wife for life "of income of estate and so much of principal as is necessary for

her support and maintenance and the education of my five daughters"; *held* widow took life estate only in real estate in trust, 50 C 493

residue after payment of debts, given to wife "for her sole use and benefit as long as she lives"; words aptly and plainly defined an estate for life only, 51 C 435

—that no disposition was made of the fee immaterial, 51 C 435

life use of entire estate to widow is, of necessity, in lieu of dower, 51 C 440

bequest of one-half of residue to wife of B, with gift over to her children if she die before B; *held* gift over was not contingent upon wife's dying before testatrix, 53 C 169

—wife took life estate during life of her husband with remainder vested in children, but liable to be defeated by wife's surviving B, 53 C 169

—security could be required of wife to protect interest of children, if she should not survive B, 53 C 169

—and where B's indebtedness to testatrix was included in wife's share, bond should cover that also, 53 C 169

—duty of executor to collect interest on notes of B, to prudently invest wife's bequest, and pay her the income, 53 C 169

devise in fee to A, B to have his support and power to sell for that purpose if necessary; by later devise remainder at B's death given to A "to have control and use during A's life"; *held* A took only a life estate commencing at death of B, 53 C 216

—B is entitled to possession and control of property during his life, 53 C 216

—his right to support includes support for a wife he afterwards married, 53 C 216

gift to wife of use of entire estate for life; by codicil a sum to two charitable societies; *held* latter not subject to life estate, 53 C 489

gift of income to wife for life with power to dispose if for her convenience or comfort; property to be in her possession for the family and support of daughter, and in trust for son; *held* widow took life estate with limited power to dispose of principal, 55 C 239

the survivor of joint life tenants having only a joint power of sale, cannot dispose of the whole or any portion of the estate, 56 C 316

—but survivor takes life interest in the whole, 56 C 316

bequest to grandchild in trust, to be paid at twenty-one, and at her decease to her children or their representatives "to take as she would take"; if no children gift over; grandchild *held* to take life estate only, 57 C 194

—but *held* entitled to possession on reaching twenty-one, without bond, 57 C 194

gift of life estate with power to spend principal necessary to support *held* not to constitute a fee, 57 C 553

—though legatee had discretion in use of principal, 57 C 553

gift of life estate in trust for husband, with provision for payment of income and principal “as he might require” for his personal use, *held* not to enlarge to fee, 58 C 210

gift of four-fifths of residue to four daughters, in trust, to receive income for life and a limited portion of principal if expedient, remainder to their heirs; *held* each daughter took an equitable life use of one-fifth, 60 C 499

a devise of life estate with power to use whatever is necessary for support, does not enlarge to a fee, 62 C 430

how life estate affected by power of disposal, 67 C 390, 72 C 593, 74 C 1, 78 C 517, 80 C 402

—unexercised power does not make estate a fee, 65 C 181

gift to W, “at his decease to go,” etc., gives W life estate, 70 C 467

life estate created, though “balance” given over, 71 C 224, 73 C 655

gift to wife of “house and lot; also all moneys, etc., during life; after her death to be divided,” etc.; life use applies only to money, 75 C 645

statute providing that property left to one for life and to his “heirs” means “children”; does not apply to distributions already made, 83 C 346

a life estate to W and residue to testator’s heirs means exclusive of W, 83 C 530

devised life estate is not affected by invalid gift over where such gift is a separate matter, 86 C 217, 220

gift to two jointly to be divided equally per stirpes, with provision that on the death of either party it should be delivered to the other, creates a life estate in each in one-half, with contingent remainder in fee, 86 C 631

gift over to A “for herself and children” gives A life estate with remainder to children per stirpes, 90 C 142

life estate not enlarged to a fee because there is power to sell, 94 C 363

gift to wife of testator of use and income of residuary estate, with power to use what she desires for her “personal comfort,” and to convey the property and use avails “as will best promote her happiness,” with gift over of “whatever remains” *held* to constitute only life estate, 96 C 325, 97 C 434

—words “personal comfort” *held* equivalent of “personal support,” 96 C 325

—wife could not give away property, 96 C 325

one may have life use of estate and take the fee either as heir or as residuary legatee, 98 C 272

—bequest to be construed in light of the one of two contingencies that has occurred, 98 C 265

gift of house and land to wife, “during her life all cash in banks or other securities,” 99 C 563

—wife *held* to take a life estate in land and an absolute estate in personalty, 99 C 567

addition of general power of sale does not enlarge life estate to fee, 101 C 39

—where power of sale was conditioned on its necessity for life tenant’s maintenance, of which he was to be judge, transfer to himself of personal property and deed of real estate for nominal consideration to another in absence of necessity are void, 101 C 39

gift of life use of estate to widow subject to right of son and his family to occupy homestead, with further provision that if son should die before widow without descendants she should get \$800, construed, 105 C 308

—widow gets alternative interests, 105 C 308

gift of life use of livestock and farming tools, is under statute absolute gift, 113 C 272

gift to B to do with property as he or his guardian may think best for his support or support of his family, *held* to create life estate, 113 C 272

life estate will not be converted into fee though coupled with a power of disposition, however extensive, 114 C 441

—gift to wife for life, to be enjoyed by her as her own estate and with full power of disposal except by will, 114 C 441

where residue is given to be distributed according to the statutes of distribution at death of life tenant ordinarily life tenant is not excluded, 115 C 269

—but rule not applied where testator gave wife one-half of his estate and life use of other half, the latter half to be distributed at her death according to the statutes of distribution, 115 C 269

gift to wife of full use and control of all the remainder, principal and income, during her life, with gift over to nephews and nieces of whatever remained unexpended at her death, *held* life estate, 117 C 489

—whatever remains of fund passes as part of remainder, 117 C 489

—“use” commonly employed in creation of life estate, and limitation “during her natural life” made intent obvious, 117 C 489

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- which was not to grant her testamentary power, 117 C 489
- cases where absolute interest is cut down to life estate by subsequent provisions, 117 C 494
- gifts to son and granddaughters with cross remainders and provision for gift over on death of each, *held* to give life estate only to granddaughters and to include real estate given first to son as part of his share, 122 C 172
- intention to cut down absolute gift in first sentence to life estate in subsequent provisions clear, 125 C 657
- provision *held* to give husband life use with full power to use or dispose of it for his benefit but to vest in son right to so much as might remain at husband's death, 127 C 243

§ 33. —Estates Tail; Rule in Shelley's Case

- words *held* to create an estate tail instead of conditional fee, K 118, 1 R 96
- devise to son and his male heirs forever passes a fee simple to sons, K 175
- devise to one and heirs male of his body, *held* to create estate tail, 1 R 79
- devise to one and heir male of his body; several heirs male will take, 1 R 555
- devise to A and the heirs of his body lawfully begotten gives A life estate only, 2 R 39
- rule in Shelley's case applied, 1 D 299
- devise to A and heirs male and in case of none to A's daughters is estate tail, 3 D 332
- deed or devise creating estate tail vests fee in issue of first donee by common law of State, 3 D 332, 88 C 292
- devise in tail to several; effect of failure of issue, 4 D 368
- conveyance by tenant conveys a base fee determinable upon his decease by entry of issue in tail, 4 C 179
- devise in fee followed by a prohibition of its disposal is an estate tail, 7 C 250
- under what circumstances an estate tail by implication may be created, 8 C 348
- construction of clause creating interminable succession of estates, *held* a fee tail, 9 C 114
- when a fee tail vests in the immediate descendant of a person in being, 9 C 114
- devise *held* to fail under rule in Shelley's case, 10 C 448
- rule in Shelley's case repealed in this State in 1821, 10 C 448, 26 C 6
- what words create an estate tail, 12 C 328
- heirs take by descent, not by purchase; unless estate vested in ancestor, they cannot take, 14 C 215, 88 C 292

- estate in tail vests wholly in first devisee during his life; heirs have no vested interest, 14 C 216, 51 C 45, 88 C 292
- "If E shall die leaving no natural heirs, then to B," *held* to be an estate tail with contingent remainder, 19 C 107
- "devise to A; A dying, leaving no heirs of his body, to B"; *held* an estate tail in A, 23 C 349
- A liable upon covenants in a warranty deed of property to stranger, 23 C 349
- "if child shall die leaving issue, such portion shall go to issue," in a general devise of land, creates an estate tail, 40 C 267
- in bequest of personalty, vests interest in issue as executory devise, 40 C 267
- construed otherwise from provisions of whole will, 40 C 267
- devise to A and his heirs forever, but if A "shall die without issue who can inherit," then over; *held* an estate tail, 51 C 33
- Legislature, with full power over estates of tenants in tail, can enlarge such estates to estates in fee or authorize tenant in tail to convey in fee, 51 C 45
- may ratify and confirm such conveyances though unauthorized, 51 C 45
- statute repealing rule in Shelley's case, 60 C 499
- does not affect act of 1784 against perpetuities, 60 C 499
- creation of estates in fee tail not presumed in case of personalty, 60 C 504
- gift over in case donee "die without issue"; if he leaves issue they take by inheritance, 66 C 402
- entailment for grandchildren implied where it would not be for distant relatives, 66 C 402
- rights of creditors and widow in property constituting principal of an estate tail, 66 C 402
- effect of words, "dying without issue," 66 C 402, 68 C 211, 78 C 362
- remainder after estate in tail, 66 C 407
- words apt for fee followed by words implying interest in donee's issue *held* to give fee tail, as provision in case G dies leaving no heirs lawfully begotten, 68 C 207
- right of one to whom estate tail is given, with gift over at his death; protection of estate, 72 C 29
- words "heirs of her body begotten" *held* to mean issue, which primarily means descendants of whatever degree, 82 C 158
- estate tail may be created in Connecticut by same language as at common law, but its legal character is defined by statute, 88 C 292, 297
- "heirs" is an essential word in creating an estate tail by deed; not necessary where it is created by devise, 88 C 292

where the evident intent is that the subsequent takers should receive the property as a direct gift, not by inheritance, it is not a fee tail, 88 C 292

under what circumstances an estate tail by implication may be created, 98 C 526

gift construed as estate tail by implication and, under Statute against Perpetuities, it becomes estate in fee simple in first donee in tail, 125 C 657

—and assuming estate tail created in person in being, first donee in tail need not be immediate issue of that person, 125 C 657

—where one donee in tail determined and other not, trust divisible and donee determined entitled to his part immediately, 125 C 657

statutory provision that estate in fee tail shall be an absolute estate in fee in issue of first donee in tail as an exception to the Statute against Perpetuities, 127 C 9

§ 34. —Executory Devise; Defeasible Fee

See also § 44, *infra*

executory devise is not defeated by a sale by first tenant, 1 R 340

devise to grandson that if he dies before twenty-one or before he has heirs of his body, then over, 2 R 191

devise to sons, their heirs and assigns forever; should any son die without children, his brothers to have his part in equal proportion; limitation over *held* good as executory devise, 5 D 517, 1 C 36

gift over if devisee “shall die without children”; devise *held* a defeasible fee, absolute on birth of child, 33 C 289

“dying without issue” refers to the time of the death of the party and not to an indefinite failure of issue, 34 C 176

“if child shall die leaving issue, such portion shall go to issue,” in a general devise of land, creates an estate tail, 40 C 267

—in bequest of personalty, vests interest in issue as executory devise, 40 C 267

devise in fee, but in case devisee die without issue, then to another, is an executory devise, 49 C 473

—defined and illustrated by cases, 49 C 475

devise of life estate to daughter, fee to her children; if she die without issue gift to other children of testator or their issue; *held* contingent, good only as executory devise, 50 C 402

—interest of other children vests only on death of daughter, 50 C 402

—where one of the other children of testator became bankrupt after death of testator but before death of daughter, *held* no

interest passed to assignee in bankruptcy, 50 C 402

what is an executory devise, 50 C 406

life estate to A, remainder to his children forever; A died childless; *held* fee vested in testator's heirs at law subject to be divested on birth of children to A, 51 C 521

—release of heirs at law, to A, vests title in her, 51 C 521

whether an executory devise vests as a transmissible and devisable interest during continuance of first estate, *quaere*, 57 C 163

devise of life estate, remainder in fee if he die without issue, *held* not to operate as an executory devise, 62 C 92

gift of personalty to A, then over, if he die without issue, creates executory devise, 72 C 29

gift to A, then over, “if she has no children” creates executory devise, 73 C 58

gift over, to A, if then living, if not, to B and C, creates executory devise, 77 C 408

executory devise and contingent remainder subject to same rules, 77 C 408

gift over, should first taker die “leaving no issue,” implies gift to issue, if any, 78 C 362

executory devise or conditional limitation, if void, leaves prior estate unaffected, 80 C 85

gift to T and at her decease to another, may take effect as an executory devise, 84 C 666

executory devise of personal property is governed by same rules as contingent remainders, 84 C 671

limitation over not in contravention of old Statute against Perpetuities, 87 C 518

vested interest, whether an executory devise or contingent remainder, is alienable and transmissible and passes on death to executors, 88 C 87, 90

gift to children of life tenant, if he dies after testator, is a limitation after a life estate, 88 C 269

defeasance conditions in will not favored, 88 C 270, 277, 92 C 440

conditional fee in English common law not recognized in Connecticut nor Statute de Donis Conditionalibus, 88 C 292

if testator gives life use to children, with remainder on death of either to his children without issue, heirs, next of kin, etc., it is presumed that estate of dying child does not share in remainder, 97 C 102

remainders preferred over executory devises, 108 C 339

executory devise not assignable at common law, 110 C 269

gift of residue to widow provided that if she should remarry testator desired estate divided equally between her and his two children, 112 C 569

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- gave her a defeasible fee in two-thirds of residue, 112 C 569
- use of word “heirs” or other term of inheritance not necessary, 112 C 573
- gift to society in event absolute donee died before life tenant was in nature of executory devise and bequest, 129 C 145
- gift to husband to be his absolutely “as long as he remains unbetrothed,” and in event of his betrothal he to have income during life, was absolute gift subject to a conditional limitation, 129 C 350
- with possible exception of certain kinds of personal property, from earliest times estates in nature of executory devises could be created in personal property, 129 C 352

§ 35. —Estates in Severalty and Cotenancy; Joint Tenancy

- “to A, and B his wife, during their natural lives,” a bequest to A and B and the survivor of them, 36 C 365
- a devise jointly, with survivorship, does not lapse on failure of one joint tenant to take, 59 C 289
- the whole goes to survivor whether failure be by death or otherwise, 59 C 289
- a bequest of personal property to two persons in common, *held* to convey no right of survivorship, 59 C 289
- though preceded by the gift of the use of realty with fee in survivor, 59 C 289
- where income is given for life to H and L, with provision that on death of either, other should take all, they are joint tenants; if one refuses gift, other takes all, 65 C 222
- gift to two, “share and share alike for their sole and separate use” *held* to create cotenancy, 72 C 595
- children *held* to take an alienable and transmissible estate in common, 82 C 159
- gift over in equal portions share and share alike; each provision *held* to be independent of the other, 86 C 221
- a devise to two or more jointly, where joint tenancy is allowed, carries property to survivor, 86 C 631, 637, 87 C 663
- in Connecticut survivorship does not exist but joint tenancy is a tenancy in common; survivorship can be specially created, 86 C 631, 637, 87 C 663
- no joint tenancy created; each had freehold in one-half property with contingent remainder in survivor, 86 C 631
- gift to two jointly and with rights of accretion to be divided between them in equal parts per stirpes, creates an estate in one-half for each with remainder to survivor, 86 C 636
- members of a class take as tenants in common, not as joint tenants, 87 C 518
- tenancy in common preferred; joint tenancy created only by express words, 87 C 664

gift to persons *nominatim* to be divided equally creates tenancy in common, 87 C 676

gift to children is a gift to a class as tenants in common, 88 C 28

a residue divided into six parts *held* not to create a joint tenancy or survivorship, 88 C 404

estate in joint tenancy with survivorship not favored but may be created, 98 C 525

—is not created by gift of estate to be divided between persons named, 98 C 525

—nor merely by use of word “surviving,” etc., 98 C 531

gift over to two daughters with provision that if either die before testator or life tenant leaving no child, other should take, or if both die before life tenant leaving no surviving child then son should take; one survived both testator and life tenant, other died before latter leaving a child; *held* child took one-half of estate by implication, 98 C 526

joint tenancies can only arise by express provision, 103 C 308

—when created they have incidents of survivorship only by like provision, 103 C 308

“survivor” or “survivors” ordinarily does not affect nature of estate created, 103 C 309

—usually refers only to takers of estate, 103 C 309

prima facie, joint legatees take as a class; otherwise where legacy is given to them as tenants in common, 120 C 93

—joint tenancy not favored and presumption is that where gift is made to several they take as tenants in common, 120 C 93

indicia of gift to class or as tenants in common will be overcome if contrary intent is shown in other parts of will, 120 C 94

joint tenancy with right of survivorship not favored in this State, but where intent in will is clear will be given effect, 125 C 421

—incident of such estate is that it may be severed by conveyance, by partition or by appropriation under process of law, 125 C 421

—agreement by joint tenants not to sever binding on them alone; would not effect creditors, 125 C 421

—where will left property to testator’s associates in business as joint tenants with proviso that acceptance would be deemed an agreement not to sever, such interest validly created, 125 C 421

§ 36. —Residuary Estates

See also § 63(2), *infra*

interest of brothers, who received bequest of life interest in stock, under residuary clause *held* to be life interest only, 33 C 270

residuum to those sharing under the will, *held* not extended to legatees by codicil, 33 C 280

legacy *held* contingent, and residuary clause absolute, 33 C 281

"residue" defined; presumption, 40 C 250

"portion" construed as not including share in residuum, 40 C 268

vested interest in policy on wife's life passes by residuary clause, 40 C 343

income from realty not specifically devised, does not go into residuum, 44 C 512

—executor has care and control for benefit of those entitled, 44 C 512

reversion in property set to widow goes to residuary legatee, 49 C 473

residuary legatees of unexpended income as well as the body of the trust fund, may question executor's charges against income, 49 C 533

—such legatees derive title not from life legatees but from testator, 49 C 533

—even the joint act of the executor and life legatees cannot prejudice them, 49 C 533

"residue" in will and codicil *held* to include the same property, 52 C 238

devise of all realty to wife for life, with residuary clause of "all the residue of my estate of whatever name or kind to my wife"; *held* under latter clause widow took fee in the realty of which she took only life use by first clause, 54 C 470

gift of legacies in trust to be expended for beneficiaries at discretion of trustee; *held* unexpended balance became residuary estate, 63 C 58

"whatever else in shape of fund" means residue, 66 C 141

residue of real estate "being a lot adjoining" a lot described cannot include lot afterwards purchased, 68 C 177

gift to widow of one-half personalty for life, and one-half absolutely, followed by gift of "the one-half of the residue," etc.; latter refers to one-half held for life; subsequent residuary clause is invalid, 68 C 182

gift over to trustees of residue gives them vested remainder in estate, less expenses of settlement, 76 C 560

residue *held* to be what was left after deducting pecuniary legacies, value of property given widow, and gift of excess over certain value of the estate, 82 C 158

—balance over meant residue after deducting homestead, 82 C 158

general residuary clause shows intent to avoid partial intestacy, 85 C 135

a residuary bequest of all personal effects including furniture, bric-a-brac, etc., is a specific bequest in spite of its naming numerous articles, 85 C 491

provision devising all residue of land, describing it, followed by general residuary clause; latter carries land not described in former, 86 C 281

a residue divided into six parts, one part given to each legatee, is not a joint tenancy or class gift with right of survivorship, 88 C 404

—any one of the parts thus given may lapse, 88 C 404

general residuary clause shows intent to avoid partial intestacy, 98 C 263

—even though legatees are charities, 98 C 322

residuary bequest to "charitable societies previously named" requires that they take subject to uses and conditions previously prescribed, 98 C 322

—not so in case of absolute residuary gift to individual, 98 C 322

conflict of rules favoring avoidance of partial intestacy and disfavoring disinheritance of heir, 98 C 329

where trust is created for payment of annuities and income is more than needed, excess not otherwise disposed of falls into residue, 105 C 261

—so where by sale of property principal is more than needed, excess may be distributed as part of residue, 105 C 261

where will provided trust and for further sum to be set aside to pay trustee's charges, remainder interest in latter and any excess of income from it went into residue, 106 C 137

where residuary gift clearly discloses intent to dispose of all property this intent should be effected if possible, 106 C 142

—general residuary clause shows intent to avoid partial intestacy, 106 C 142

residuary devise not a specific devise, 106 C 611

where residue is put in trust to make payments from income which fall far short of exhausting it and no intent to accumulate appears, excess income is intestate, 106 C 627

income earned upon it, not disposed of, becomes part of principal and is disposed of as such, 108 C 100

—hence where one-half residue is given to individual and one-half to trustees for life tenants, latter get one-half income earned by residue, and other half is divided between individual and them, 108 C 100

—residue defined, 108 C 109

gift to aunt of "any real or personal property that I have not herein disposed of" was in nature of general residuary gift, 116 C 266

—and carried commuted value of unpaid instalments which under Veterans Act

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were payable on death of beneficiary to estate, 116 C 266

—possibility that beneficiary may die before all instalments paid creates interest in their commuted value which is in existence at death of insured, 116 C 266

residue means that portion of estate that remains after payment of debts, legacies and administration charges, 121 C 682

gift of residue containing real estate with direction to sell latter considered with other provisions of will, *held* to have been gift of personalty, 123 C 196

real residuary provision of will determined, despite references to rest and residue, etc., in other parts of will, 124 C 459

—remainder interest in shares of stock, attempted gift of which failed, falls into it, 124 C 459

residue is that portion which remains after payment of debts, charges and particular legacies, 124 C 578

where portion is set aside in trust without provision for its disposition at end of that use, remainder goes to make up deficiencies in particular legacies in preference to bequest to residuary legatee, 124 C 578

—testator may vary rule by provisions showing such intent, 124 C 578

—so where, at termination of trust, funds were “to become part of my residuary estate,” language did not show intent to vary usual rule of law, and they went first to satisfy unpaid particular legacies in preference to residuary legatee, 124 C 579

where testator placed rest and residue of his property in a trust in which was a concluding provision for the distribution of “all the rest and residue of my estate,” latter was real residuary clause into which void gifts would fall, 127 C 2

§ 37. Vested or Contingent Estates; Conditions Precedent and Subsequent

See also §§ 42, 43, 45, *infra*

§ 38. —General Principles

law favors vesting of estates and unless contrary intent appears they take effect at death of testator though enjoyment is postponed by interposition of life estate or otherwise, 8 C 48, 40 C 120, 133, 53 C 261, 68 C 177, 72 C 494, 73 C 57, 72, 89, 106, 114, 307, 655, 74 C 228, 80 C 83, 83 C 12, 87 C 518, 673, 88 C 28, 86, 287, 89 C 270, 92 C 440, 96 C 62, 98 C 280, 103 C 122, 106 C 267, 634, 108 C 339, 109 C 7, 112 C 104, 113 C 618, 115 C 269, 445, 117 C 553, 124 C 460

construction will not favor intent to give legacies upon remote and improbable contingencies, 12 C 350

legacy to one “as,” “if,” “when,” or “provided” he arrives at certain age is contingent by English rule; questionable if so here, 33 C 281

—legacy “payable” or “to be paid” at such time, *held* vested by English rule, 33 C 286

legacy to be paid or divided at future time vests on death of testator, 33 C 294, 74 C 218

—when words equivocal, contingency or condition is construed to apply to time of payment instead of gift, 33 C 294, 106 C 273, 109 C 17

rule where legacy takes effect in point of right at one time, and in point of enjoyment at another, 48 C 60

property in trust fund *held* to be “acquired” on testator’s death, under statute, 49 C 52

court will construe devise or legacy as vested in doubtful cases, 53 C 278

—law does not favor construction which suspends title or holds it in abeyance, 53 C 279, 63 C 300, 106 C 627

what is a condition precedent; necessity of fulfilling it before donee is entitled, 65 C 10

meaning of “vested,” 65 C 499, 88 C 90

meaning of vested as regards transmissible estate and possibility of its falling into residue, 82 C 168

a limitation over after a life estate vests the interests in remainderman, 87 C 518

an estate does not vest during a life estate if the parties to take cannot be determined until life estate ends, 87 C 663

law favors vested estates, 87 C 664

rule that where gift takes form of a direction to pay over at a future time, it is to be regarded as vested then, repudiated, 87 C 664

division of property between persons named imports direct gift, 87 C 664

early vesting favored, 92 C 440

any condition can be imposed precedent to the vesting of an estate, provided it is not uncertain, unlawful, or opposed to public policy, 92 C 507

interests vest *prima facie* on death of testator, whether present or prospective, 108 C 340

—words of futurity preferably not taken as imposing a condition precedent, 108 C 340

essential to constitute vested right as distinguished from one that is expectant or contingent, that right of enjoyment has become property of some particular person as present interest, 118 C 233

contingent remainder becomes vested when happening of contingency which might defeat it is no longer possible, 129 C 225

§ 39. —Particular Cases

devise of use to wife until majority of son, then to son, vests fee immediately in son, subject to personal trust in mother, 2 D 338

legacy *held* contingent, and residuary clause absolute, 33 C 281

"to the children my daughters have or may have, to be divided when youngest comes of age," *held* vested in the youngest though dying a minor, 33 C 295

—and in one born after testator's death and dying, 33 C 295

legacy to A in trust for B, B to have the income until of age when principal to be his in fee; B survived testator but died in minority; *held* legacy vested in B on testator's death, 49 C 130, 474

—but possession was to be postponed until he was of age, 49 C 474

gift for erection of chapel in three years, but power in judge of Probate Court to extend period to some definite time; *held* a condition subsequent; gift vested at once, 52 C 412

—might be divested for nonperformance of condition, 52 C 412

—power given to judge is not within Statute against Perpetuities, 52 C 412

gift to son with gift over if he should die during minority or without issue; *held* on construction of whole will, that "or" should read "and," and the gift to be vested absolutely at majority, 54 C 11

gift of income to sons and their families; distribution to their heirs when their youngest child becomes of age if "the trustee and judge of probate shall think it safe to do so"; *held* that gift vested in fee in grandchildren at death of testator, 55 C 256

—presumption in favor of offspring and against intestacy aids an inference of an intended fee, 55 C 256

provision that one-fifth of the share of each son should be invested and "go to his personal representatives"; *held* one-fifth vested in the son's personal representatives, 55 C 319

—son cannot dispose of share by will, 55 C 319

residuary estate *held* to vest in legatees named, on testator's death, subject to a fourteen-year trust, 63 C 300

gift to grandchildren when twenty-one, with appointment of trustee for each; trustees take vested interest, payable at same time as other bequests, 64 C 257

gift of income until certain age, then of principal, vests on testator's death, 73 C 89, 124 C 460

condition construed to be subsequent rather than precedent, but intent controls, 74 C 634

"shall vest" *held* to refer to possession, 77 C 472

income of trust created for a definite period was given, in part, after ten years to children then living and "legal representatives" of any deceased child; *held*, they took vested interest inheritable, etc., for period of time of the trust, 83 C 382

gift to A to be paid when twenty-one, and if he died before, to B, is an immediate gift to A with payment postponed; no contingency or condition or delay in vesting, 87 C 175

—gift over an alternative disposition embodying condition subsequent, 87 C 175

—gift held in trust until A is twenty-one and he then receives accumulated interest and principal, 87 C 175

property left to eldest nephew on condition he lives in a certain town; if he did not, or left no descendants, then to other nephews under same condition; if any nephew left descendants, property divided among them; *held* a direct gift to descendant of nephew in contingency expressed; they took by purchase, not by inheritance; no estate tail created, 88 C 292

gift *held* to create vested remainder in J in first instance defeasible on condition subsequent if he died before forty, 98 C 263

gift of \$5000 to daughter, payable at her marriage, "the interest on this money accruing during all the time until the reverting to her of the principal," gives her a vested gift with postponement of enjoyment, income meanwhile to accumulate, 98 C 274

gift of real estate on condition that donees use proceeds of life insurance policy payable to them to reduce any mortgages or expenses on property constitutes gift on condition subsequent, 99 C 563

—they must exonerate estate from any charges on account of property, 99 C 563

life estate to wife with bequest of money to her upon existence of specified conditions, *held* to create alternate vested interests, 105 C 308

when futurity is annexed to substance of gift, vesting is postponed, 106 C 267

—where testator made certain gift if estate less than certain sum on decease of life tenant but other gifts if it exceeded that sum, *held* gift did not vest until death of life tenant, 106 C 267

gift in trust to accumulate and gift to town if it built certain bridge within twenty-five years, if not, "all rights of said town" to cease, and gift over to charity, creates a gift upon condition subsequent, 112 C 216

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—second gift vests, subject to be divested by failure of town to build bridge, 112 C 216

—law prefers conditions subsequent, so that estate will be vested, 112 C 220

income of trust to son with right in trustee to withhold any part not needed for his support, with gift over of principal; income vested in son subject to right of trustee to withhold it, (dis.) 119 C 143

where heir would be entitled if trusts to come into effect in future are invalid, he has an interest transmissible and divisible and which will descend on death, 128 C 17

where percentage of income given to two persons for life and “balance” to children of W and issue of any deceased child, children of W living at testatrix’ death and issue of any child dying before her took alienable and transmissible interest, 128 C 387

—“balance” included share of income of one of the two persons who died before expiration of trust, 128 C 387

§ 40. Remainders

§ 41. —In General

bequest to widow, so long as she remains so, of part, followed by bequest of whole estate to children; *held* children took remainder interest in widow’s part, 2 D 28

—on marriage of widow, action of account will lie to recover personal property limited over, 2 D 28

cross remainder created only by express words or by necessary implication, 4 D 372

limitation of use of personalty, with remainder over, not favored, 15 C 291

charge on land; remainderman takes subject to the charge, 16 C 501

sale by trustee of all owner’s interest will not convey contingent remainder, 32 C 342

devise in trust for life of children, and on death of one, his share to vest in the rest; *held* such remainder over vested in survivors free from the trust, 34 C 300

vested remainder is not affected by sale of trust property, 37 C 348

—proceeds of sale do not belong to remainderman, 37 C 348

creation of a remainder in personal chattels after life estate is lawful, 51 C 438, 64 C 348, 72 C 30, 76 C 448

—intention must be found in will, 51 C 438

gift of residue to wife in fee; further provision that what she may not use should go to a church; *held* gift of fee exhausted entire estate, and therefore there was no

remainder upon which gift could operate, 62 C 93

remainderman has interest devisable, 64 C 344, 68 C 177, 83 C 11

—and transmissible, 72 C 494, 77 C 80

direction to executor to invest estate, pay annuities out of income, taking money from children’s share, and to pay over rest of income to children; on death of annuitants, children entitled to principal, 65 C 501

may be created after estate tail, 66 C 409

—gift over, should first taker die without issue, 66 C 401, 78 C 362

no remainder after an absolute estate, 67 C 394

where income is given in trust for life, remainderman, whose right to possession is postponed, is still entitled to income from death of life tenant, 73 C 58

no conveyance necessary to perfect title of one in whom equitable remainder in fee vests on death of testator, 73 C 106

executory devise of personal property and contingent remainder subject to same rules re alienation or transmission, 77 C 408

where trustees have discretion to withhold income, add it to principal, and again withdraw it, rights of remainderman maturing before such withdrawal, 78 C 498

where there is a gift over in the absence of an instrument of appointment, and instrument makes appointment partly invalid, remaindermen take part not validly appointed, 81 C 34

gift in trust for sons for life, then for their wives and children, with gift over at the death of the wives and “all the children”; after death of one son, his widow and children took the share he had had, till the death of the last survivor, 81 C 181, 83 C 382

gift to A, B, and C for life, then to their children; if no children, then to others for life, remainder to their children; children of A to take his share per stirpes severally, not as a class; *held* a vested transmissible interest by way of contingent remainder, 83 C 12

life estate to W and residue to testator’s heirs means exclusive of W, 83 C 530

vested interest, whether an executory devise or a contingent remainder, is alienable and transmissible and passes on death of child to his executors, 88 C 87

gift over, whether first donee die before or after testator, creates substitutionary gift in first instance, remainder in the second, 88 C 269

a life beneficiary of a trust has no present right of possession as an absolute estate, simply because she is sole legatee of the remainder interest, 90 C 63

gift over to A "for herself and children" gives A life estate with remainder to children per stirpes, 90 C 142

gift to A and B "to be to them and their heirs forever" *held* not to be gift of remainder to heirs, 93 C 69

—ordinarily such a phrase is one of limitation, 93 C 76

rights of remainderman entitled to principal on death of life beneficiaries, 93 C 558

where estate is left to one for life, remainder to his children and if none to testator's children, presumption is testator intended to exclude life tenant from this class, 97 C 109

a gift over after D's death to "heirs of said D and J," was a gift to J directly, 102 C 401

where life tenant becomes also entitled to remainder as heir on death of remainderman, estate merges and she has entire fee, 106 C 514

where testator created certain annuities, then gave life use of one-half of residue with remainder over, remaindermen entitled to any sum not needed for annuities on death of life tenant, 109 C 7

after death of life tenant of residue, vested remainderman is entitled to principal provided gifts of annuities are secured; remainderman also entitled to excess income from annuity fund, 109 C 7

after death of life tenant of residue, contingent remainderman not entitled to income before contingency occurs; such income is intestate estate, 109 C 7

wife received half absolutely and life interest in other half, remainder of which was to be distributed according to laws of distribution, 115 C 269

—under plan of will *held* wife's estate did not share in remainder, 115 C 269

—and distributees should be determined as having vested interest at testator's death, 115 C 269

gift over after life estate divided among testatrix' brothers or their children vests at her death in brothers then living and children of any brothers then deceased, 115 C 443

—direction that estate be divided among beneficiaries does not postpone vesting, 115 C 445

valid remainder at termination of life estate may be created though life tenant is given right to use or dispose of it, 127 C 247

unless will otherwise indicates, life tenant who falls in a class to whom remainder is given will take, 128 C 386

—where, however, will gave income to children of W particularly including life tenant but remainder was given simply to

children of W not mentioning life tenant, she did not take, 128 C 387

§ 42. —Vested or Contingent

devise in the alternative: "if dying before twenty-one, or before having heirs of his body," 2 R 192

—vests at twenty-one, though devisee die without heirs of his body, 2 R 192

effect of death of remainderman before termination of particular estate, 5 C 98

devise vested at testator's death, though not to be taken till wife's death, 8 C 48

remainder vested or contingent, when, 8 C 359

devise to A for life, remainder to her heirs; whether interest of child born prior to will was vested or contingent during life of A, *quaere*, 18 C 101

"If E shall die leaving no natural heirs, then to B," *held* to be estate tail with contingent remainder, 19 C 107

phrases "on decease of," "at the decease of," "upon the decease of" life tenant relates to time of possession merely, 40 C 133, 112 C 104, 113 C 618, 115 C 278, 445

life estate to A, remainder to his children forever; A died childless; *held* fee vested in testator's heirs at law, subject to be divested on birth of children to A, 51 C 521

bequest of one-half of residue to wife of B, with gift over to her children if she die before B; *held* gift over was not contingent upon wife's dying before testatrix, 53 C 169

—wife took life estate during life of her husband with remainder vested in children, but liable to be defeated by wife's surviving B, 53 C 169

distribution at a later period to grandchildren then living; grandchildren living at death of testator took a vested interest in remainder, 53 C 261

—where children of deceased grandchildren were to take parents' share, and widow of such grandchild one-third, if there were no children, *held* title divested if grandchild left no widow or children, 53 C 261

—disposition as above does not violate Statute against Perpetuities, 53 C 261

difference between vested and contingent remainders, 53 C 279, 87 C 664, 93 C 518, 534, 103 C 64, 308, 108 C 339, 109 C 7, 118 C 233

bequest to three persons as long as they remain unmarried; *held* marriage of one does not affect the rights of the other two, 55 C 167

—and where there was a remainder over, *held* one-third vested in remainderman on the marriage or death of each, 55 C 167

vested remainder in A, with provision that if A died without issue remainder should

§ 42 Wills

- go to children of testator; *held* that on death of A before termination of life estate, remainder vested at once in children, 62 C 89
- postponement of time of payment does not postpone time of vesting, 64 C 348, 73 C 64, 74 C 228, 75 C 501, 88 C 28
- as where possession is postponed to permit sale of realty, 75 C 501
- gift of income for life to children, to be “distributed” on their death, with later provision giving one-half of income to surviving husbands of children, if any; estate *held* to vest in enjoyment on death of children, 65 C 501
- gift over, should first donee fail to accept, vests on his refusal, 69 C 77
- death of first taker before testator gives immediate effect to remainder, 70 C 467, 76 C 263, 77 C 408
- gift, after death of A, to his children, if none, to L; L has contingent remainder, 72 C 29, 75 C 501
- gift over, where life tenant has power of disposal, creates vested remainder, 72 C 494, 73 C 655, 113 C 273
- where gift was made to widow for life or until her remarriage, with gift over “on the death of my wife,” remainderman takes vested remainder which passes to him on widow’s remarriage, 73 C 72
- life interest following life estate with power of disposal is contingent, 74 C 1
- contingent remainder vests on happening of contingency, though precise amount is unascertainable, 74 C 218, 75 C 501, 76 C 451
- must vest at once on termination of prior estate, 76 C 451
- on death of one entitled to vested remainder before it falls into his possession, his estate becomes entitled to such remainder, 74 C 228
- gift over “in case” donee survives, then gift to his heirs; latter not contingent, 76 C 149
- gift over of income to A, on her death to her children; issue of each child to take share of any deceased parent; latter estate is contingent, 76 C 185
- gift over of balance unexpended to children of first taker living at his death is contingent, 76 C 447
- alternative contingent remainders, 76 C 450
- gift in trust, with gift over when trust terminated, by vote of beneficiaries after death of son and his wife and on their youngest son reaching twenty-one, or at end of thirty years, *held* to create vested, equitable remainders or cross-remainders, 76 C 522
- gift over of residue to trustees; gift vests when first limitation ends, to amount left after settlement of estate, 76 C 560
- rights where devisee dies before contingency happens, 77 C 408
- executory devise and contingent remainder in personal property subject to same rules, 77 C 408, 84 C 671
- gift over of income to children of life tenant equally, until they respectively reach twenty-one; each takes vested interest at death of life tenant, to be possessed on reaching twenty-one, 78 C 498
- where gift over is made, with substitutionary conditional limitation void as against Statute against Perpetuities, donee takes vested remainder, 80 C 82
- gift of land to B for life, of rest of estate to B in trust, with provision that, on B’s death, land shall fall into trust; B takes, as trustee, vested remainder in land, 80 C 459
- gift in trust, after life estate, for S and her children, with provision that “if after the death of my daughter S and her son C should be living and attained to the age of twenty-five years, then I give” to him, etc.; C gets vested remainder, 81 C 105
- gift to A, B, C for life, on death to their children; if there are children living, they take per stirpes a vested interest in remainder to be divested by death before life tenant, 83 C 12
- children of A and B take vested, transmissible interest by way of contingent remainder in portion of C; when C dies leaving no children, interest becomes absolute, 83 C 12
- gift to legal representatives of life tenant, or to named persons “as may be living” or “if living” at a certain time, leaves to future the ascertainment of beneficiaries and is contingent, 85 C 135, 87 C 664, 108 C 345
- after termination of two successive life estates, then to brothers and sisters equally and to the children of any dying before termination of life estate, *held* to create alternative contingent remainder, 86 C 217
- invalidity of one or more shares does not affect the remaining, 86 C 217
- gift to sons on condition that on death of one survivor takes his share; no joint tenancy; each had freehold with contingent remainder to survivor, 86 C 631
- limitation over if life tenant dies without issue creates vested interest, 87 C 518, 96 C 62
- gift to named persons “or as many as may be living” is to persons in existence; vests at testator’s death, to be divested as to those dying before life tenant, 87 C 664
- a vested remainder will not be defeated unless the very contingency provided for happens, 87 C 664
- gift in remainder to children is transmissible estate in each of the children who survive

- testator whether they outlive life tenant or not; may be diminished by birth of other children, 88 C 28
- property left to wife for life, remainder in fee to son's lawful issue, if none to nine children of A and B equally; son died childless before widow; *held* each of nine children took vested interest, the use and enjoyment of which was postponed during life estate, 88 C 86
- gift to issue of nephews and nieces twenty-five years after death, with intermediate gifts of income, is a remainder which vests at once, 89 C 270
- property at husband's death in fee to children of brothers, each child then living or representative of deceased child to have equal share; if property vested before death of life tenant, it became divested at his death in favor of beneficiaries who then became entitled to its use and enjoyment, 90 C 685
- if event upon which remainder is to be enjoyed depends upon whether one will or will not do something in the future, it is contingent, not vested, 93 C 518
- gift to E for life, on his death without issue, to D and H absolutely; D and H take vested, alienable, transmissible estate on E's death, 96 C 62
- H dying before E, on latter's death without issue, estate is divided between H's estate and D, 96 C 62
- gift of use and income of residue to wife of testator, with power to dispose of principal, and gift over of "whatever remains" to A; A died before wife; *held*, A's heirs, M and E, took her interest on her death, 96 C 326
- where wife transferred a part of estate to a savings account in joint name of herself and M and drew on it till her death, after which M drew income, *held* that, A's estate having been fully administered, title of her administrator might be disregarded, 96 C 326
- bank held title in trust for A's heirs, 96 C 326
- Statute of Limitations would not bar claim of E as M never had possession of fund and bank was continuing trustee, 96 C 326
- E having died, her estate was entitled to half fund at wife's death, with interest, and to M the other half with interest less her withdrawals, 96 C 326
- one may leave life use of property to person and also give him share in fee as heir or residuary legatee, 98 C 263
- gift in trust, J to have income of one-third until he was forty and income of another third to go to certain life tenant, without disposal of remainder; residue to go to nephews living at testator's decease, of whom J was one; J dying before he was forty, his estate took share of remainder of both thirds, 98 C 263
- income accruing on J's share during his life went to his estate, subsequent income into residue, 98 C 263
- J took vested remainder in first instance defeasible on condition subsequent, on his death before forty; nephew took contingent remainder under residuary clause, 98 C 268
- where will provides two contingencies and one occurs other is to be disregarded, 98 C 263
- gift of principal "to revert" to sons on termination of life use makes vested gift with postponement of enjoyment till expiration of life use, 98 C 280
- gift of residue to wife for life, at her death to be equally divided between two daughters; if either die before testator or wife leaving no child her share to go to other if living; if both die before wife leaving no child then to go to son; *held* each daughter took vested defeasible remainder, 98 C 525
- both daughters survived testator but one died before wife leaving child; *held* as contingency named had not happened estate went half to living daughter, half to estate of deceased daughter, 98 C 525
- remainder is vested where testator makes gift over expressly in an event which will terminate prior estate, 98 C 533
- uncertainty in right of enjoyment, not uncertainty of enjoyment, makes estate contingent, 98 C 534, 118 C 233
- gift of income of estate to be divided among children or their heirs till death of last, then estate to be divided among heirs; heirs of child dying before distribution take vested estate at his death, alienable and transmissible by inheritance, but postponed in enjoyment, 98 C 827
- gift of one-half estate to widow during widowhood, then to fall to residue; gift of residue in trust, income to persons named; on death of any beneficiary his portion to go to his children, if any, absolutely; children take vested remainder in both estate set apart for widow and in residue, 99 C 187
- gift for life to M, in event of her death no issue surviving, the property to be divided among her brothers and sisters and their issue per stirpes; on death of testator brothers and sisters took vested interest by way of contingent remainder, 103 C 54
- this became fully vested on death of M without surviving children, 103 C 54
- remainder is vested when it is alienable and devisable, 103 C 64

§ 42 Wills

widow of deceased remainderman entitled to his share as his heir at law, 103 C 122

vesting is determined by present capacity of donee to take on happening of event upon which remainder is limited, 103 C 310

—not on certainty that he will be in existence when event occurs, 103 C 310, 108 C 339

remainder interest at termination of trust to pay annuities, as to “heirs of the blood of my father,” those who were such when testator dies took vested interest with enjoyment postponed, 105 C 261

—that two were also annuitants *held* immaterial, 105 C 261

—where income more than needed for annuities *held* excess vested in remainderman to be paid from time to time, 105 C 261

—if by sale of property principal more than needed, the excess may be distributed to remaindermen, 105 C 261

—how amount to be retained is determined, 105 C 284

remainders preferred over executory devises; vested remainders over contingent remainders, 108 C 339

postponement of possession alone does not mean gift in future, 108 C 345

legacy given to be paid at future time vests immediately, one not given until future time vests then, 109 C 7, 115 C 269

—gift over to children of E with provision that, if any die before the legacy to him “shall take effect” then to his lineal descendants, vested in children at testator’s death, 109 C 7

—words “shall take effect” mean shall vest, 109 C 7

—where testator provided that half of residue should “on decease” of one of annuitants go to his children, if he have any surviving, gift to them was contingent, 109 C 7

—income from this half was intestate, 109 C 7

—it could not be paid to children as incident of gift of principal, because that was contingent, 109 C 7

gift over at death of life tenant to her children, with gift to others if she die without children *held* to vest in child as soon as she was born, 112 C 104

—and subsequent death of child before life tenant would not divest her share, which would pass as her estate, 112 C 104

gift of remainder after life estate, to beneficiaries under residuary article, vested at death of testator, 112 C 216

gifts to beneficiaries “at death of my wife” created indefeasible vested remainder interests on death of testator, 113 C 618

—did not lapse though beneficiaries died before wife, 113 C 618

gift “at decease of my wife” to A “if living,” is conditioned upon beneficiary surviving wife and lapsed where he predeceased her, 113 C 618

provision that remainder shall be divided after death of life tenant “among my brothers, or their children,” 115 C 443

—brothers who predeceased testatrix take nothing, 115 C 443

—gift vested at testatrix’ death, 115 C 443

—and division to be made per stirpes, 115 C 443

half of residue to wife for life and at her death to become part of residuary estate; other half divided into parts, income from one part to be applied for use of each child till certain age when child would receive principal, 117 C 553

—intent of testator that remainder after wife’s death should become increment of residue devised to children with enjoyment postponed till her death, 117 C 553

—each child took vested interest in remainder of part left to wife for life, which vested at testator’s death, 117 C 553

—and share of child in that remainder, who died before wife, became part of her estate, 117 C 553

where B transferred securities to trustee, income to be paid wife for life and then to B, and at the death of survivor, unless agreement modified or revoked, principal to go to B’s estate, no vested right in remainder was created, 118 C 233

where E transferred securities to trustee, income to be paid her husband during life and then to her and upon the death of the survivor the principal to go to such persons as husband might name in his will or to their daughters with the right in husband to revoke trust, *held* that no vested remainder was created, 118 C 233

trust providing that principal be divided among children when youngest reached thirty, if settlor and wife then dead; children each had vested remainder which was alienable by them and transmissible by will or inheritance, 125 C 616

where will provides that at conclusion of life estate property shall be divided among a group or the survivors of them, provision for survival relates to situation existing at termination of life estate, 127 C 101

—each of group named takes vested interest subject to defeasance should he die before that time, unless a special intent to contrary is found in will, 127 C 101

provision *held* to give husband life use with full power to use or dispose of it for his benefit but to vest in son right to so much

as might remain at husband's death, 127 C 243

where, at termination of life estate, principal given to children of W and issue of any of his children who had died, children of W living at death of testatrix and then living issue of child who predeceased her took vested alienable and transmissible estate, 128 C 387

§ 43. Gifts to a Class; Gifts Nominatim

when property is given to class, those in esse at testator's death will take the whole and the class will open for those born afterwards, before period of distribution, 21 C 623, 53 C 183, 261, 56 C 240, 63 C 299, 88 C 28, 270, 89 C 270, 90 C 142, 99 C 187

prima facie, joint legatees take as a class; otherwise, where legacy is given to them as tenants in common, 39 C 217, 72 C 597, 120 C 93

legacy to several by name, to be equally divided; share of one dying before testator, lapses, 39 C 217

—aliter, if legacy be to them as a class, 39 C 217

bequest to "sons of my two sisters deceased"; *held* they took as a class, 39 C 253

where legacy to a class takes effect in point of right at one time and in point of enjoyment at another, general rule is that all those will take who are embraced in class at time legacy takes effect in point of enjoyment, 48 C 60

beneficiaries too as a class where bequest in trust to be paid at a fixed time "to my grandchildren, children of my son N, or to such of them as shall be living, to be equally divided between them"; class opened to take in child of N born before distribution, and earlier clause making specific gift to each child of N then living *held* not to limit later clause to those children, 53 C 183

—so bequest in trust, distribution at a later period to grandchildren then living, 53 C 261

devise of remainder to son of life tenant, if other children were born they to share equally; son died leaving brother later born; *held* remainder vested in surviving son subject to open and let in later born children, 53 C 216

issue of legatee who dies before reaching age for distribution of legacy takes legacy at once and absolutely, 56 C 240

bequest for use of son for life, then to his children in fee; if none, then to grandchildren of testator in fee; *held* latter took as a class a vested contingent remainder, subject to be divested by birth of child to son, 57 C 163

legatees designated by name and standing in different relations to testator do not take as a class, 62 C 140

bequest to brother's grandchildren *held* class gift, 63 C 299

it is immaterial that the persons who will ultimately take in possession property left in trust for a class, differ from those who took in right at testator's death, 63 C 299

—provided their time of taking is not too remote, 63 C 299

when gift to children or other beneficiaries is class gift, 65 C 51

—income or bequest to be paid in equal parts to persons named does not constitute, 65 C 51, 67 C 9, 74 C 144, 88 C 404

—so gift to one who predeceases testator lapses, 88 C 404, 120 C 77

children of testator's daughter as class took vested remainder in one-half estate and vested interest by way of contingent remainder in other half, becoming absolute on death of J, 65 C 492

gift after death of life tenants to be divided equally to their children per capita is class gift; vests at once; when class is finally determined, 65 C 513, 73 C 57

where subsequent provision in will refers to those before "named," this may include class, as "heirs," who then are treated as unit, 70 C 44

gift to heirs of deceased niece is class gift, 70 C 47

gift "to my nephews and nieces, they being my lawful heirs," is class gift, 70 C 283

share of one of class dying before testator goes to survivors, 72 C 597

while in some cases members of a class take as joint tenants, they do not so take when intent is otherwise, 73 C 307

—gift over to issue of any member dying indicates tenancy in common, 73 C 307

—in gift to A, a widower, and his children, child of subsequent marriage is included, 73 C 307

gift to nephews and nieces or their legal heirs is class gift, 74 C 228

gift over to grandnieces, including those "born thereafter," means during life estate, 76 C 561

where life tenant, with power of appointment, appointed to children living at her decease and the issue of any then dead, gift treated as to a class and was distributed among those who could lawfully take, 81 C 34

after termination of trust, property to grandchildren then living, per capita, is class gift, 83 C 370

trust for education of nephews, then over, *held* to terminate on death of each one living at testator's death, though others might be born, 86 C 90

§ 43 Wills

gift to children or heirs at law is a class gift, and they take as tenants in common, not as joint tenants, 87 C 518, 88 C 28

where an estate is to be divided among children or as many as may be living at death of last life tenant, the legal representatives of those dying before the life tenant take the share of the deceased, 87 C 664

child en ventre sa mere considered as in being if it is to its interest, 88 C 35

gift of remainder to "legal issue" of nephews and nieces is one to a class; they take per capita, 89 C 270

gift over to A "for herself and children," children taking fee on A's death per stirpes as a class, 90 C 142

property left in trust for life, remainder to cousin and children; *held* cousin took a life estate, children in fee per stirpes, class to open and take in after-born children, 90 C 142

gift for life, over to children and their representatives "then living"; legatees are determined at death of life tenant, 90 C 687

property can vest in children as a class which opens to let in after-born ones, 92 C 507

unless will indicates otherwise, a gift in remainder to next of kin, issue of life tenant, etc. is a gift to a class vesting at testator's death, with right of possession postponed during life tenant's life, 97 C 102, 98 C 337, 115 C 269, 118 C 167

where testator gave life use to two children, with remainder in share of child dying without issue to testator's next of kin, *held*, such share would be divided between other living life tenant and heirs of another child, excluding estate of life tenant dying, 97 C 102

statute providing that under certain circumstances the issue of a beneficiary dying before testator might take in his stead may apply to gifts to a class, 97 C 434

—but would not bring into class issue of one who died two years before will was made, 97 C 434

—gift to "brothers and sisters" presumed not to include one that is deceased or his issue, 97 C 434

gift of residue to nephews living at testator's death construed as class gift, including one nephew who was given life use of part of principal, 98 C 263

inartificial will providing that income should "revert to my four sons or as many of them as shall be living and my daughter" gave sons and daughter present vested interest as a class, 98 C 275

gift in remainder to issue of life tenants, unless will indicates contrary, vests in them as class at testator's death, though right of possession is postponed, 98 C 337

gift on death of beneficiary to his children, if any, absolutely is one to a class; income accumulated but not paid over would go to estate of person dying, 99 C 187

fund equally to "all my grandchildren" is gift to a class; distributed per capita, 100 C 351
in gift over to all testatrix' grandchildren and the issue of deceased grandchildren born during her life, if any, "they to take per stirpes and not per capita," "they" referred to issue of deceased grandchildren, 100 C 351

where testator gave income for life to children, or "issue" of any dying, upon death of any child without issue, husband or wife, his share to go to surviving children and "issue" of any dying, and on death of last survivor principal to go to grandchildren per stirpes, they took at testator's death a vested right to income in case of death of parent and to principal on final distribution, 103 C 122

if member of class to whom remainder is given dies before estate vests in enjoyment his right descends to his heirs, 103 C 136

—so if right to part of income has vested in enjoyment that also descends to heir, 103 C 136

provision that share of one dying without issue shall go to survivors exhausts itself after it has once operated, 103 C 308

—will not extend to again pass shares which have once accrued under it, 103 C 308

—exceptions to rule where contrary intent appears, 103 C 308

—where fund was regarded as existing in undivided form at time of distribution, 103 C 308

—where gift over is of whole fund, 103 C 308

—gift in trust for four children, on death of any leaving issue they to take share free of charge, on death of any without issue, share to be held in trust for survivors, if all die without issue "then" to testator's heirs, *held* where two children have died leaving issue and third without issue, fourth had interest of third's share during life, 103 C 308

—but her issue could not take share of principal at her death, 103 C 308

—"then" referred to time of distribution not to final vesting, 103 C 308

—that no member in existence at testator's death no objection to vesting of estate in class as it will vest when member is born, 103 C 310

—each set of grandchildren took vested interest by way of contingent remainder as a class, becoming effective when one of them was born, though after testatrix, 103 C 329
implied exclusion of one in designated class of remaindermen because he is also life

tenant; indication of contrary intent, 105 C 271

gift over to children of living grandchildren valid as a class gift opening to let in children subsequently born, 106 C 627

where provision was that one-half share of each member be paid when he became thirty and one-half when he became fifty, class finally determined when termination of first period is reached, 106 C 627

in absence of contrary intent, class comprises those described who are living at decease of testator and does not include one dying before him, 108 C 106

gift of remainder to children of life tenant *held* to vest on birth of child; interest alienable and transmissible; death of child does not exclude him from class, 112 C 104

gift over after life estate in wife with power of disposal to testator's surviving nephews and nieces, *held* to mean those who survive at death of wife, 114 C 441

gift to legal heirs designates a class members of which are determined at date of testator's death, 115 C 239

—where nieces and nephews and grandnieces and grandnephews take, distribution should be per stirpes and not per capita, 115 C 239

fact that life tenant is sole member of class to whom remainder is given does not prevent property passing to his estate, 116 C 271

in some cases will, construed in light of circumstances, has clearly indicated purpose to postpone vesting until termination of life estate, 118 C 167

—in instant case gift to natural heirs after life estate, they being brothers and sister at time will was made and at time of testatrix' death, *held* to vest at death, this being general scheme of will, 118 C 167

—contrary construction of will in dissenting opinion, 118 C 171

gift to be equally divided among cousins residing in Connecticut, naming them, *held* not to be gift to class, 120 C 77

—indicia of gift to persons designated as individuals, rather than as a group, 120 C 77

—and no distinguishing characteristic common to those named, their residence in Connecticut being merely descriptive, 120 C 77

gift to a class creates in effect a joint tenancy, with right of survivorship incident, 120 C 93

—such tenancy not favored, and presumption is that where a gift is made to several they take as tenants in common, without right of survivorship, 120 C 93

—provisions looking to a division of property have always, even under common-law rule which favors joint tenancies, been re-

garded as sufficient to create tenancy in common, 120 C 93

indicia of gift to class or as tenants in common will be overcome if contrary intent is shown in other parts of will, 120 C 94

in absence of other indication of intent, it is to be expected that in gift to class members would have some common characteristic sufficient to distinguish the group from other individuals or groups, 120 C 95

gifts to groups designated as children, grandchildren, etc., uniformly construed as made to a class which opens to let in after-born members, 127 C 115

—cannot be given different meaning merely to avoid rule against perpetuities except where there is basis for intent to use words in narrower sense, 127 C 115

gift of income to two of testator's brothers by name and his sister during remainder of their lives was not a class gift but to beneficiaries as individuals, 128 C 566

—right of any one of them dying before termination of trust to receive income terminated at his death, 128 C 567

§ 44. Substitutionary Gifts; Gifts Over in Case of Death or Death without Issue

dying without issue means without issue at time of death of first devisee, 1 R 336, 5 D 517, 8 C 359, 13 C 42, 33 C 289, 34 C 177, 74 C 40

—means dying without issue during life of testator, 52 C 518, 54 C 511, 55 C 359, 57 C 154, 295, 70 C 87, 78 C 362, 84 C 665, 101 C 529

—means death at any time, 57 C 194, 71 C 57, 82 C 158, 83 C 12, 91 C 630

—means dying before termination of life estate; where clause gave A vested remainder in fee and following clause provided that if A die without issue the property should be divided among children of testator, *held* that the two clauses should be read as one, 62 C 89

—context determines meaning of, 66 C 402, 68 C 211, 84 C 665, 92 C 441

—does not mean before testator's death where gift over in remainder was made with intent to keep property in family, 71 C 57

devise over, provided first taker dies "without leaving any issue," means his death during testator's lifetime; if first devisee survives testator, he takes absolute estate, 52 C 518, 101 C 529

bequest of one-half of residue to A, wife of B, with gift over to children of A, if she die before B; *held* gift over not contingent upon A's dying before testatrix, 53 C 169

§ 44 Wills

gift to son with gift over if he should die during minority or without issue; *held* on construction of whole will, "or" should read "and" and the gift vested absolutely at majority, 54 C 11

bequest or devise to A, and, in case of his death, to B, means A's death in lifetime of testator, 57 C 154, 295, 68 C 211, 91 C 630

bequest to grandchild in trust, to be paid at twenty-one, and at her decease to her children or their representatives, "to take as she would take"; if no children gift over; *held* "at her decease," meant death at any time, and not merely before death of testatrix, 57 C 194

—"to take as she would take," *held* to apply to conditions of trust, 57 C 200

—grandchild *held* to take life estate only, 57 C 194

—but entitled to possession on reaching twenty-one, without bond, 57 C 194

gift to one, and, in case of his death, to his heirs, means death during life of testator, 65 C 54, 89

—but gift over to grandchildren and their heirs, means heirs of those dying during first estate, 65 C 54, 89

gift to A, to have and to hold, to him, his heirs and assigns *held* not substitutionary, 67 C 249

gift to children, then over to grandchildren, with provision that, if either child dies without issue, her share goes to other for life, then to latter's children; effect of simultaneous death of testator and one child, childless, 71 C 57

gift over, should donee "die without leaving heirs," construed, 71 C 283

gifts to persons "or their heirs" as substitutionary, 73 C 111, 80 C 83

gift to be paid at end of certain period to donees "or their heirs," *held* to mean heirs of those dying before testator, 74 C 228

residue equally to brothers and sisters; brother died childless and codicil gave his share to niece for life, remainder to issue; second codicil gave property to G's children, should niece die without issue; latter take transmissible and alienable estate, 82 C 159

gift to T and at his death over, may mean before or after testatrix; context determines, 84 C 666

a gift of money to T and at his death to a church *held* to go to the church on T's death before testatrix, by substitution, 84 C 666

gift to two sons "or their legitimate children"; gift to latter *held* substitutionary; children only take in case of sons' death before testatrix, 86 C 631

limitation over if life tenant dies without issue creates vested interest, 87 C 518, 96 C 62

gift to one's surviving issue, if any, does not prevent property vesting under an alternative provision if there is no issue, 88 C 86

gift to children of life tenant if he dies before testator is a substitutionary gift; if he dies after testator, a limitation after a life estate, 88 C 269

gift of one-half residue to R with provision that if R die without issue and G be then not living and have left no issue, X should take; construction with reference to whether R's death whenever that might occur, or her death within a limited period, was meant, 92 C 440

"in the event of the death" of C, *held* to mean at his death whenever occurring, 92 C 507

if gift made to children of testator for life and on death of either without issue, to testator's next of kin, children, heirs, etc., it is presumed that estate of child dying is excluded from remainder, 97 C 102

gift over provided first devisee dies "without leaving any issue" means his death before testator, 101 C 529

—if he survives he takes whole estate, 101 C 529

in provision for trust for children, if all die without issue "then" principal was to go to testator's heirs, "then" refers to time of distribution, not to vesting of estate, 103 C 309

failure to provide for survivorship indicates intent not to have it apply, 106 C 178

survivor of two life beneficiaries does not take share of deceased unless so provided, 108 C 100

provision that if any legatee or devisee should die before testator, his share should go according to his will or Statute of Distributions, cannot apply as regards legatee who dies before will executed, 108 C 100

—but would pass share to widow of legatee thereafter dying who was sole heir, 108 C 100

in gift over if donee died before devise "shall take effect" *held* to mean "shall vest," 109 C 7

gift of remainders with provision that if beneficiary dies before coming into possession, others were to take, creates gift by substitution in latter, 113 C 618

—they take if first beneficiary dies before life tenant, 113 C 618

gifts at termination of trust to four persons, with provisions that if any should die before that time without issue gift should go to the survivors or issue, but if the legatee dying left issue, they were to take; where two died before termination of trust, leav-

ing children, survivors could not take gifts of those dying, as condition of gift to them had not been met, 127 C 1
 —but gifts to two who survived termination of trust were good, 127 C 1

§ 45. Conditions and Restrictions; Validity

§ 46. —In General

devise conditional on maintenance of widow, *held* to be a charge on land, 1 R 234
 devise “on paying” *held* conditional, 2 C 196
 conditional fee created by will, may be followed into hands of vendee with notice, 7 C 205
 devise on condition of paying “debts and funeral expenses” includes taxes and tomb-
 “within ten years after my decease” did not limit gift to daughter if she should survive husband, 18 C 333
 life interest on condition of supporting family; no forfeiture if income appropriated for that purpose proved insufficient, 23 C 447
 bequest on illegal condition gives legatee the property free from restraint, 29 C 406
 devise on condition of paying “debts and funeral expenses,” includes taxes and tombstone, 30 C 205
 legacy to school district on condition *held* to lapse by vote to do an act repugnant to condition, 36 C 365
 vested interest is not defeated until the very case in which it is not to vest happens, 40 C 136
 bequest to “my wife” in lieu of dower; divorce obtained by husband; bequest *held* not conditional on her remaining wife of testator, 48 C 493
 —words “my wife” are merely descriptive of person, 48 C 503
 —relinquishment of dower not in nature of consideration for the bequest, 48 C 503
 —need not be able to relinquish dower to take bequest, 48 C 503
 —the divorce, as matter of law, did not revoke the bequest, 48 C 503
 bequest to three persons so long as they remain unmarried; *held* marriage of one does not affect others, 55 C 170
 —remainder over *held* to vest one-third in remainderman on marriage or death of each, 55 C 171
 a devise of use to two persons jointly with fee in survivor, upon an expressed condition, with residuary clause; *held* the violation of condition intended was by either or both separately, not necessarily joint, 59 C 289
 —a violation by one *held* to work a forfeiture of his interest only, 59 C 289
 —and the other legatee took property as sole survivor, 59 C 289

bequest of personal property to sons “after payment of my debts”; devise of real estate to daughters; *held* “debts” included a mortgage on the real estate, 59 C 455
 —especially where personal property obtained by the mortgage was given to the sons in a codicil, 59 C 456
 —acts of sons *held* an acceptance of the bequest, and to render them personally liable for the payment of the debts, 59 C 456
 —the fact that the personal property out of which the debts were to be paid was less than the debts, *held* on facts to be immaterial, 59 C 456
 charitable bequest on condition that certain land should be given free of cost, *held* to mean that title should be conveyed to the trustees within twenty years, 63 C 125
 —conveyances of site not a condition precedent to bequest taking effect, 63 C 125
 gift to B, placed in trustee’s hands until he should perform “stipulations” to J, then “will” to be absolute in B; effect of failure to perform; B’s right to income, 64 C 496
 condition for payment of annuity fulfilled by giving and acceptance of necessities in lieu thereof, 64 C 496
 gift conditioned on donee’s devoting himself to testator’s business to satisfaction of persons named; court cannot interfere with their discretion, but refusal of services simply for dislike of donee will not prevent gift vesting, 65 C 1
 where income is given on condition to two life tenants, and one refuses and other never receives property, trustee may be appointed to carry out terms of condition, 65 C 222
 condition does not become binding on life tenant until property is received, 65 C 222
 gift to widow, reduced if she remarries, is valid limitation, and is in lieu of dower; right of widow in personalty, 70 C 357
 legacy in restraint of second marriage upheld; restraint of marriage generally, 73 C 72
 provision that if heir made “unjust claim” he should receive \$1 in lieu of bequest; application to facts, 74 C 137
 gift conditioned to take effect if A gets a divorce, separates from his wife, or marries a respectable woman, valid, 88 C 387
 if a condition can be legally performed, not presumed testator intended illegal performance, 88 C 387
 under the facts *held* that wife, not having remarried, had power to will property to such children as she saw fit, 91 C 240
 provisions of forfeiture in a will if one contests it, not sustained in Connecticut if a contest is made in good faith to interpret the will, 92 C 168

§ 46 Wills

provisions of forfeiture in a will are sustained even if there is no gift over and the property is intestate, 92 C 168

contest as to testamentary capacity of testator is a breach of forfeiture clause in a will in spite of stipulation by all the beneficiaries that issue be confined to question of perpetuities, 92 C 168

testator can impose what conditions he wishes if not uncertain, unlawful, or against public policy, 92 C 507, 93 C 410, 105 C 261

gift conditioned on nonuser of liquor and tobacco by beneficiaries and their husbands, good against immediate beneficiaries, but void as respects the husbands, 92 C 508

gift conditioned on spelling family name in certain manner, valid, 92 C 508

validity of conditions determined by their inherent reasonableness viewed from a legal standpoint, 93 C 403

where, after gift absolute to son, it was provided that if he continued his intemperate habits none of the before described estate was to be set to him but he should receive only \$5, provision was held void for uncertainty, 99 C 647

—and son having been permitted possession of estate for thirty years it was too late for other heirs to question his right, 99 C 647

effect of election of widow to take statutory share upon provisions for others and provision against her remarriage, 100 C 367

provision that if certain organizations should establish home for destitute and form separate organization within five years of testator's death, then they should receive fund, creates estate on condition, 101 C 518

where testator made gift on condition that donee assume certain liabilities except certain notes which they had indorsed jointly, one-half of which he directed to be paid by his estate, effect is a recognition of existing obligation on testator's death, not bequest of one-half of notes to donee, 101 C 699

effect of provision in favor of daughter "in event of marriage," when daughter secretly married before execution of the will, 102 C 503

testator may impose such terms on enjoyment of estate as he pleases provided they are not uncertain, unlawful or against public policy, 105 C 263

—but provisions forbidding leases for more than one year or erection of buildings more than three stories high in case of central city property *held* void, 105 C 263

—particularly when designed to benefit no one, 105 C 286

where testator attaches certain conditions to gift, acceptance requires that it be administered accordingly, 113 C 205

will forbade sale by trustees of stock in N Company and trustees asked advice as to their power to exchange it for stock in new company in proposed reorganization, 118 C 509

—as nature of business, corporate objects and proportionate stock ownership in new corporation would not be changed, change effected would be of form not substance, 118 C 509

—and exchange of stock would not conflict with testator's underlying purpose that his interest in this business be not sold, 118 C 509

—prohibition in will would remain applicable and effective as to the new stock received, 118 C 509

—and there would not be such change in investment as would make inapplicable statutory authority of trustees to hold stock in new corporation as securities received from testator, 118 C 509

§ 47. —Restraints on Alienation

construction depriving devisee of power to alienate or mortgage is not given unless the terms be unequivocal, 16 C 523

devise to sons; estate not to be sold until three years after death of mother; *held* all power of alienation during term was not taken away, 21 C 379

—ejectment lies by mortgagee of sons during the term, 21 C 379

language *held* to constitute only personal restriction on alienation, 27 C 628

—conveyance to heirs of testator not included in the restriction, 27 C 628

gift for life, with restriction on alienation of property, and gift over, is good, 71 C 470

reasonable restraint on alienation is legal; trust to pay income to one for period of years and then to convey principal, 93 C 402

restraints on alienation may be direct or indirect, 93 C 518

rule designed to reach restraints on alienation due to postponement of remote future interests, not indirect restraints, 93 C 527

gift of real estate to three sons, not to be sold till youngest became of age, with provision that if any son then wished it for place of business he was to pay rental, was invalid for uncertainty; gift to sons with restraint till youngest was of age would be enforced in disregard of rest, 99 C 563

a provision after gift apparently absolute that property be not sold or mortgaged but go to heirs of children of donee on their death not construed as restraint on alienation by donees as that would be void, 99 C 647

—gift over to "heirs" of children on their death void where gift took effect in 1886, 99 C 647

rule against restraints on alienation distinguished from Rule against Perpetuities, 105 C 262

—ordinarily restraint valid if not extending beyond life or lives in being and twenty-one years, 105 C 262

—but may be invalid as against public policy within that period, 105 C 262

—provision that trustee shall not sell land forming part of estate till annuities created are all paid and they extend to lives of children to be born after testator's death; gift *held* invalid, 105 C 262

—this does not invalidate rest of trust; property may be sold, sum set aside for purposes of trust, and balance paid over to residuary devisees, 105 C 263

where will creates estate with definite legal incidents later attempt to curtail those incidents is void as effort to restrain alienation of fee, 105 C 262

—but this principle does not apply to trusts, 105 C 262

accumulations for an extended period may be illegal restraint and opposed to public policy, 109 C 7

provision that trust property be not sold until youngest child reaches twenty-one, which could not be more than eleven years, not invalid as restraint on alienation, 109 C 194

—so denial of right of trustee to make permanent improvements, 109 C 194

will left property to testator's associates in business as joint tenants with provision that acceptance would be deemed an agreement not to sever; such agreement *held* not a restraint against public policy, 125 C 422

—restraint was calculated to secure skilled and harmonious conduct of enterprise, 125 C 439

rule de restraint on alienation has for its purpose prevention of assets becoming frozen and productive property rendered useless, 125 C 438

generally held that condition imposed by testator that property shall not be partitioned after death not invalid as illegal restraint on alienation, 125 C 438

law does not favor restraints on alienation and will not recognize them unless stated in unequivocal terms, 128 C 31

—devise of property "with the understanding" that farm shall not be sold until \$15,000 can be realized on it *held* not obligatory restraint, 128 C 31

§ 48. Powers

See also TRUSTS § 14

§ 49. —In General; Creation and Validity

use to daughter as long as she remains single and her mother lives; at death of mother

avails, if land sold, to go to daughter, 15 C 473

—if power of sale is not exercised, fee is in daughter, 15 C 473

power to appoint; failure to appoint; *held* fund did not go into residue, but became intestate estate, 30 C 297

devisee of life estate with power to sell at discretion and for his own use takes a fee, 34 C 404

term "want" construed "need"; power of sale; necessity, 34 C 404

—to be actual necessity, not mere expectation of it, 34 C 404

testator may confer power on executor to determine meaning and construction of will, 40 C 9

—abuse of such power would be restrained by equity, 40 C 9

—such power is not affected by interest or relationship of executor, 40 C 9

gift or devise generally, with power of sale and no limitation, carries fee, if language leaves it doubtful whether life estate or fee is intended, 46 C 455

life estate created by express words, *held* not enlarged by power of sale, 46 C 456

—but intention of will is conclusive, 46 C 456

—exercise of power of sale by life owner *held* to convey a fee, 46 C 459

where will gives executor power to sell, all devises are subject thereto, 54 C 64

gift of income to wife for life with power to dispose of same if for her convenience or comfort; property to be in her possession for the family, for the education and support of daughter, and in trust for son; *held* widow took life estate with limited power to dispose of principal, 55 C 239

—that widow was bound to render annual accounts to Probate Court and her expenditures were subject to its supervision, 55 C 239

—that widow as trustee might be required to give bonds for faithful discharge of her duties, 55 C 239

power of sale *held* not to convert a life estate into a fee simple, but to be merely an authority to change the investments, 56 C 319

power "to convey any portion of my estate," if properly exercised, will convey a fee, 56 C 319

gift of life estate with power to spend principal necessary to support, *held* not to constitute a fee, 57 C 553

—although legatee had discretion in use of principal, 57 C 553

—his discretion *held* reviewable by Probate Court, 57 C 553

power of sale *held* a personal one in trustee, requiring no action of Probate Court, but

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that such power had a narrow compass and should be sparingly used, 61 C 14

where life tenant has power of sale and to use proceeds, and one of remaindermen devises his interest to life tenant, right of tenant on sale of property, 64 C 344

how life estate is affected by power of disposal, 67 C 390, 72 C 593, 74 C 1, 78 C 517, 80 C 402

—unexercised power does not make estate an equitable fee, 65 C 181

where testator gives restricted power to surviving trustees to fill vacancy from two persons, then, by codicil, appoints one of two a trustee, power fails, 72 C 494

power in executors to construe will survives and decision is binding, 73 C 106

power in donee to select is personal; how accomplished where donee dies without having exercised it, 74 C 128

power in cestui to dispose of principal does not enlarge his estate, 78 C 81

general power of appointment construed to carry equitable title, 81 C 46

validity of appointment by a widow is governed, as to remoteness, by the same rule as would have been applied if original testator made the same provisions in favor of the same appointees, 83 C 5

valid provisions of a will that exercised power of appointment were separable from invalid; valid are to be given effect if legally exercised; otherwise recourse must be had to original will for intent, 85 C 172

power to sell real estate *held* not granted by the will, in order to make a more convenient distribution, 89 C 271

powers depending on discretion of donee of the power end at his death, 90 C 461

powers that a court can compel donee of the power to execute survive, such as to determine boy's capacity to manage property, 90 C 461

testamentary authority to sell and convey implies authority to alienate at discretion, 91 C 621

where paper was found after donee's death somewhat in form of will and signed by her, conclusion that it was not intended by her to be a final execution of the power and so effectual upheld, 99 C 245

propriety of including power of sale in will and its effect, 99 C 598

property appointed is charged in equity with debts of donee of power, 111 C 594

appointee derives title from will of donor of power, 111 C 594

—legal title never vests in donee nor is part of his estate, 111 C 594

exercise of power of appointment not taxable here where donor of power died in New York, 111 C 594

gift of use and control of remainder to wife during her natural life followed by gift over to nephews and nieces did not grant to wife testamentary power over estate, 117 C 489

equitable doctrine which prefers creditors of person having power of appointment to appointees if estate of person exercising power is insufficient to pay debts, inapplicable between surety on bond given by such person and her appointees, 124 C 417

§ 50. —Construction and Exercise of Power

facts did not furnish satisfactory evidence of a corrupt appointment by widow, 33 C 481

power of appointment by will; execution must refer to power itself or subject of it, 46 C 248

simple reference to "my estate" by trustee having life interest is not an execution of power, 46 C 248

when authorized to continue firm business executor may pledge assets, 49 C 9

language of will *held* to create a naked power to sell without interest, 51 C 188

—donee of such power has no right to authorize drain in land not sold, 51 C 188

wife with unrestricted power to sell "during her natural life," remaindermen over; *held* "during her natural life" did not limit estate, 52 C 557

—had absolute power to dispose of property during her lifetime, 52 C 557

—and she could dispose of property by gift, 52 C 558

devise in fee to A, B to have his support and power to sell for that purpose if necessary; by later devise remainder at B's death given to A "to have control and use during A's life"; B *held* entitled to possession and control of property during his life, 53 C 216

—his right to support includes support for a wife he afterwards married, 53 C 216

direction to sell "all my real estate and effects" means real and personal property, 55 C 168

the survivor of two joint tenants for life having only a joint power of sale cannot dispose of the whole or any portion of the estate, 56 C 319

—but survivor takes life interest in the whole, 56 C 319

gift of life estate in trust for brother "for his personal comfort"; trustees to see "that he is properly cared for"; trustees may if necessary use a portion of the principal for such purpose, 57 C 24

power in life tenant to sell "said life estate," *held* to give power to sell fee, 65 C 162

life estate in residue given to widow, with power of disposal for her "proper maintenance and support"; right to possession of

property; restrictions as to disposal, 69 C 411

directions for sale of real estate at discretion of executor empowers him to sell, 73 C 436

where land left to widow for life with power of sale for her comfort and support, proceeds of sale undisposed of become part of testator's estate, 74 C 1

power of sale in wife for her support, construed, 74 C 502

power to sell does not permit mortgage, 74 C 502, 76 C 212, 77 C 411

limits of power of sale in life tenant for purchase of necessities, how determined; no order of court necessary, 78 C 517, 80 C 402

where power is directed to be exercised by writing in form of will under laws of Connecticut, effect of exercising it by instrument in form of will under New York laws and of admission of will to probate here; invalidity of will, 80 C 438

power which may be lawfully exercised is valid, though it may be also unlawfully exercised, 81 C 34

—validity of power of appointment determined at testator's death, and measured thence, 81 C 34

power to select "legal heirs" *held* to be exercised at death of life tenant, not at testator's death, 83 C 5

exercise of power of appointment must not transcend provision of will that created power, 85 C 172

gift to wife for life, unless she remarry; if she does, gift over to others, but wife to have disposal of all property of which she retains the life estate, *held* "retains" refers to her not marrying, not to possible conveyance by her of the property, 91 C 240

under will, if wife remained unmarried, she had power to will husband's property, including real estate, to such children as she saw fit, 91 C 240

execution of power by will sufficient though inartificially expressed, 91 C 241

power of sale unlimited despite gift over at death of life tenant and proceeds may be used for upkeep of estate despite provisions for investment, 91 C 620

power to sell and dispose of property of which one only had the income merely gives right of sale for convenience in managing estate and not the right of appointment, 94 C 363

power of appointment "by writing or by will"; intention of donee decisive factor, 99 C 251

—intention deducible solely from writing, a question of law reviewable on appeal, 99 C 252

—where dependent in part on extrinsic evidence, intention is question of fact, 99 C 252

—if intent is doubtful, power is not exercised, 99 C 255

where statutory share of estate has been given to wife and residue given to others and she is appointed executrix with power to encroach on principal of estate for her comfortable support, power is restricted to period of settlement of estate, 101 C 529

powers of appointment how exercised, 105 C 57

—extrinsic evidence admissible to show whether gift was exercise of power, 105 C 57

—question is, did power exist and did testator know he had it, not did he know its source or legal aspects, 105 C 57

—so question is did he intend to exercise it and this must be so clear that instrument not susceptible of other interpretation, 105 C 57

—intent may be shown by reference to power, or to its subject matter or by provision otherwise inoperative, 105 C 57

—latter depends on situation when will was drawn, 105 C 57

—comparison of testator's property and estate under power is proper, 105 C 57

—reference to property as "my estate" not unnatural, 105 C 57

—will drawn before power created may execute it if it was known to testator, 105 C 57

—where will made gift far in excess of testator's own property *held* he intended to execute power, 105 C 57

bequest of real estate and money in banks for life, with right to dispose of real estate only with consent of B if he is living, gives life tenant no right to dispose of money, 113 C 271

—power to dispose of property as beneficiary thinks best for own use for benefit of another, imposes no duty as to that other, 113 C 271

§ 51. Construction of Miscellaneous Provisions, Words and Phrases

See also § 69, *infra*

release of all notes and mortgages in testator's favor against children does not include mortgage by company assumed by son, 46 C 236

husband's rights attach to bequest to wife unless clearly excluded, 49 C 53

—provisions *held* to create separate estate in wife, 49 C 53

—expressions reviewed and *held* not to create separate estate in wife, 49 C 54

gift to daughter as sole and separate estate "or until her children marry or become of age"; clause concerning her children *held* to be of no effect, 55 C 361

§ 51 Wills

bequest to W for "a collegiate and theological education," *held* not available for a business or scientific education, 57 C 24

—whether being fitted for Institute of Technology is equivalent to "being fitted for college," *quaere*, 57 C 24

bequest to nephews and nieces for a "collegiate and theological education," contemplates such education for nieces as was available and suitable for young women, 57 C 24

—Wellesley College *held* to afford such education, 57 C 24

—Wesleyan University *held* to afford such education for nephew intending to study for the ministry, 57 C 24

—entitled to bequest until completion of studies or abandonment of theological course, 57 C 24

"shall have received his or her share," *held* equivalent to "shall have become entitled to" etc., 57 C 295

"or" *held* to imply power of choice or election, 60 C 39

"any" *held* to mean one out of several or many, 60 C 39

"I hereby appoint P trustee of my estate," *held* to give a legal title to the trustee named, 63 C 300

"stipulations" and "will" given usual meaning by context, 64 C 496

"until G discharge his present liabilities," construed, 66 C 401

"judge of probate" means Court of Probate, 69 C 702

"debt" *held* to include life annuity given in earlier paragraph, 73 C 57

"if you go short, take out of each one share," construed, 73 C 57

gift over, "to go back to the Nobles," construed, 73 C 58

devisee may be said to "receive" share in estate when he becomes entitled to it, 73 C 89

"hereinafter named" may extend to codicil, 73 C 124

direction to set aside sufficient fund to raise certain income, with provision for payment of funeral expenses out of same *held* to authorize use of principal, 73 C 670

—provisions for increasing payments for certain of beneficiaries restricted to fund set apart for each, 73 C 670

"loan" does not include money due on note secured by mortgage given for sale of land, 75 C 684

construction of will providing that interest in business shall not be divided for ten years, income meanwhile to be paid to heirs, etc., 77 C 176

"pay over and deliver" imports a gift of principal, 87 C 518

direction to divide certain property imports a gift, 93 C 69

provision for payment of sum to daughter when her husband dies, not applicable to divorce secured from him, 94 C 426

direction to maintain home with all its appurtenances means all the land comprising two large tracts on opposite sides of the highway, with all buildings and improvements and furniture in the house, with the necessary renewals and taxes, 95 C 122

right to use property for "personal comfort" of beneficiary *held*, to mean "personal support," 96 C 325

interest "accruing" *held* to mean accumulating, 98 C 278

direction to "pay over and deliver" estate to heirs of life tenant on his death imports a gift to such heirs, 98 C 821

gift of lot to wife "outright" to be sold or rented and proceeds used to pay mortgages and expenses upon other premises given her construed, 99 C 563

meaning of words "to be distributed," 99 C 631

"in such case" interpreted, 100 C 351

intention cannot be inferred in gift to home to be established that it must be self-sustaining without gift, because that was more prudent method, 101 C 519

the word "then" may denote time or "in such case" or "in that event," 106 C 267

provision directing \$1000 to be paid to grandchildren for a "college course or professional course" or "a course in a young ladies' seminary" construed, 106 C 627

reference to rights in estate stated to be in process of settlement, where it had already been settled, apply to property distributed to testatrix, 107 C 409

option given sons to purchase stock owned by testator, they to have six months "to determine whether or not they desire to purchase" gives them six months to make decision and a reasonable time thereafter to complete purchase, 107 C 716

—giving of notes for purchase as permitted under will, five months after expiration of option, *held* in reasonable time, 107 C 716

—where one of sons and his mother were executors knowledge of both and delivery of written notice to son, read by him to mother, sufficient exercise of option, 107 C 719

—delivery of notes to one executor, in law delivery to both, 107 C 716

gift of income of farm and then of proceeds of its sale after ten years does not create two distinct funds, 108 C 339

"parents share" given to issue of beneficiary who might die, construed, 111 C 120

word "pay" often used in sense of transfer; particularly "pay over," 117 C 377

"then" used in conjunctive sense rather than as adverb; equivalent to "also," 118 C 608

"benevolent" standing by itself is broader than word "charitable," 128 C 638
 nothing in terms of will indicated that "benevolent" was used with other than natural significance, and executors could select beneficiaries accordingly, 128 C 638
 "institutions" given its broad meaning of established societies or corporations, 128 C 642
 provision giving husband property "to be his absolutely as long as he remains unmarried" not so uncertain that it could not be given effect, 129 C 350

§ 52. Suits for Construction

§ 53. —In General

equity will construe will on executor's request only when great interests are involved, or where ordinary litigation would create great expense and delay, 32 C 484
 claimant under will cannot accept benefits and defeat burdensome provisions, 51 C 160
 executor cannot maintain suit for construction after final settlement, 60 C 393
 executor asking construction of will cannot amend by asking removal of cloud, as trustee, under statute, 60 C 393
 a suit for the construction of a will does not lie to determine question of title after settlement and distribution, 62 C 95
 an executor or administrator in a suit for construction of will should take no position of active hostility to validity of will, 63 C 300
 nature; United States Circuit Court can entertain, 65 C 161
 can be entertained, though estate is in process of settlement in Probate Court, 65 C 177
 court may finally reverse ruling of trial court as to part of controversy alone, where it is separable, 65 C 183, 67 C 18
 will be entertained only where administrator cannot safely proceed, 67 C 14, 78 C 4
 validity of mortgage note held by testator cannot be determined in construction suit, 69 C 416
 where amount involved is small, court will use its discretion as to maintaining suit, 72 C 29
 counsel ought not to represent both executor or trustee, and devisee, 77 C 470
 where ordinary action can determine question, suit to construe ought not to be brought, 79 C 360, 84 C 497
 court will not advise as to disposition of real estate in another State, 80 C 44
 that beneficiary unites to uphold claim opposed to his right does not alter duty of court, 81 C 36
 if this was State of testator's domicil and of probate of will, suit properly lies here,

though parties reside out of State, power in question was exercised there, and part of estate was converted into realty there, 81 C 36
 in construction of testamentary trust, no advice given as to title of property not belonging to trust estate, 81 C 106
 on the facts before it, *held* court could not pass on question of merger of right of one who took in part as heir and in part under will, 82 C 159
 court disregards provisions as to contingencies which never happened, 82 C 163
 Supreme Court would not advise as to who would be entitled to benefit of fund that went to estates of children of A and B who had died since testator, 83 C 11
 conclusiveness of judgment given twenty-five years before, 83 C 369
 cases cited as precedents in suits on wills can have little weight unless facts are substantially identical, 85 C 135
 conclusions of Supreme Court on construction of will, even if incorrect, must control in determining questions involved in such conclusions, 85 C 172
 —a question involving contingency of a child's dying without issue, not being involved in a former adjudication, will be decided now under present law, 85 C 172
 who are the heirs is not involved in determination of validity and construction of will, 86 C 611
 holographic will made in France interpreted by our laws, but meaning of French words is regarded for purpose of translation, 86 C 631
 Superior Court should not, in suit to construe will, give instructions as to requiring bonds, appointing trustees, etc., 86 C 631
 court will assume that all facts favorable to party instituting action appear in the record, 87 C 175
 whether A should receive income of trust fund should not be tried in a suit for construction of a will, but in action against trustee, 88 C 387
 there is a difference between a construction of a will to see if plaintiff has a standing to ask for an interpretation, and the effect of a suit brought for an interpretation only, 90 C 63
 incidental questions relating to procedure and not to substantive rights are not considered, 91 C 241
 advice confined to construction and effect of will in suit brought by testamentary trustees, 93 C 472
 our courts cannot by declaratory judgment determine interests in land in another State, 98 C 549

§ 53 Wills

- or say who was intended by devise to “Braman,” 98 C 549
- where other heirs acquiesce in possession of portion of estate by one of them for thirty years it is too late to invoke clause in will that if he continue intemperate he should not have more than \$5, 99 C 647
- that five of six children ask certain construction favorable to mother cannot alter rules, 101 C 533
- in action involving construction of will, demurrer to complaint improper, unless all those interested are parties and all relevant, extraneous facts are made to appear, 104 C 97
- general rule that this State will not construe a foreign will where title to personal property or foreign real estate is involved; exceptions stated, 108 C 611
- where testatrix’ will was unambiguous but real question was as to nature of interest it conveyed under will in which she was legatee, no occasion to construe her will, 108 C 611
- and construction of other will not properly before court, 108 C 611
- where that will was made by person domiciled in another State our court would not ordinarily attempt to construe it, 108 C 611
- certainly where it did not appear that it had not been construed there and circumstances indicated it might have been, 108 C 611
- if construed there, that construction is conclusive here, 108 C 611
- where rights are doubtful and all parties enter into agreement defining them, upon which they stand, court will follow it, 109 C 272
- neither Probate Court nor Superior Court on appeal can directly construe will, 110 C 150
- where facts have been stipulated to on reservation, question of their admissibility not necessary or proper, 112 C 569
- validity of provisions of will devising remainder interests to heirs of life tenants not finally adjudicated by decree distributing remainder interest after death of one of them, 116 C 396
- burden on plaintiff trustee which instituted proceedings for construction of will to see to it that facts essential to determining whether stock dividends should be added to principal or treated as income are presented, 121 C 682
- essential facts not having been presented to it, court was in error in adjudicating issue, 121 C 682
- unappealed judgment of Superior Court conclusive on construction of will, 125 C 657

- where court not informed as to State where corporation domiciled, where its law would control question asked, it refused to give advice, 127 C 675
- where plaintiff would be presently entitled as heir-at-law if certain trusts were invalid, proper to claim declaration as to their validity, 128 C 12
- that certain parties wished disposition of property contrary to construction of will, will not justify court in giving effect to their desires, 128 C 571
- court in error in refusing to answer question whether institution could be selected as beneficiary within scope of word “benevolent” but which would not be “charitable,” 128 C 643
- ordinarily the proper judgment where a court erroneously fails to adjudicate an issue is to remand the case that it may do so, 128 C 644
- but where record presented entire proceedings and question was essentially one of law, Supreme Court answered it, 128 C 644

§ 54. —Contingent or Future Rights

- court need not, but may, answer questions prematurely suggested or dependent on contingencies, 65 C 182, 77 C 470, 88 C 269, 287, 90 C 517, 92 C 507, 99 C 188
- gift in trust for C for life, then to children, if any, if not, to heirs; in suit during C’s life, question as to provisions at her death are premature, 83 C 654
- testamentary construction which rests on a contingency that will affect one unborn is not given unless their rights will not be prejudiced, 83 C 655
- construction of paragraph of will providing for contingency will not be made where contingency has not occurred, 111 C 683
- advice will not be given as to construction of will in view of contingency which has not occurred even though counsel are in substantial accord on matter, 112 C 114
- where trustees cannot, with safety to themselves and to the rights and interests of others, determine the course they should take, they are entitled to the advice of the court, 118 C 509
- where question was whether they could participate in the proposed reorganization of corporation in which they held stock, request for advice is not prematurely made, 118 C 509
- not function of Supreme Court to give advice as to contingencies which may never happen, where no apparent present need, 127 C 653
- court might in its discretion determine validity of certain trusts though future events might make question academic, 128 C 12

analogy and distinction between actions by executors, administrators or trustees seeking construction of wills and trusts and actions for declaratory judgments, 128 C 18

—former constitute invocation of equitable power of court to advise a fiduciary and there is no need to give advice where question is not one affecting present administration of estate, 128 C 18

upon occasion a will may be construed though persons subsequently born may have an interest, 128 C 386

—whether decision would be binding upon such persons who might claim an interest, *quaere*, 128 C 386

where there is need to decide rights between living persons, such determination need not be postponed because persons subsequently born might raise questions, 128 C 386

—where ordinarily court does not answer questions as to future rights, where possibility that unborn children would have rights is remote and there is absence of doubt as to answers and litigation may be avoided, court did so, 128 C 386

questions concerning rights and obligations of donee of gift on conditional limitation after property comes into his possession not properly before court in suit for construction of will, 129 C 354

§ 55. —Parties

necessity of presence of all parties interested under will in suit for construction, 60 C 500

suit to construe will can be properly brought only by executor, administrator *c. t. a.*, or a trustee, 63 C 300

—heirs and legatees have no right to ask the court to advise *de* their controversies, 63 C 300

executor or administrator as party to suit to construe will, 65 C 161, 72 C 256, 79 C 362

administrator *c. t. a.* has no present interest in right of life tenant to appropriate under unexercised power of sale, 65 C 161

—but where question of right of life tenant to property is involved, such administrator is indispensable party; so is life tenant; heirs of deceased remaindermen are proper parties, 65 C 176

where testator sought to have English administrator administer property there, and American property here, former indispensable to suit for construction of will here, 67 C 9

—latter entitled to maintain it as to questions appertaining to local administration, 67 C 14

court will not decide questions as to intestacy of estate, unless all who would take thereby are parties, 71 C 220

—but court answered one question as determinative of cause, rather than remand for further notice, 71 C 222

where executors are interested beneficially, they should appear individually, 72 C 254
as to hearing executor where all parties beneficially interested are before court, 79 C 362

whether heir-at-law can question capacity of a corporation to take a legacy, *quaere*, 82 C 188

opinion on testamentary construction not ordinarily given unless all interested are parties, or it is necessary to protect executor or trustee, 83 C 655

personal representative of testator should be made a party to construction of will even if it has been turned over to a trustee, 83 C 656

advice not ordinarily given in construction of will unless all parties are present; court may do so at its discretion, 87 C 664

where Supreme Court decided wholly in favor of estate not represented, it left it with the Superior Court to see that proper parties were brought in, 87 C 665, 88 C 86

where remainderman is dead, his executor or administrator is a necessary party; his heirs are unnecessary parties, 88 C 87

suit to determine scope, significance, and effect of a will can only be brought by one in a position of trust for his guidance, 90 C 63

life tenant is not in a position to ask for a construction of a will as to her rights as a remainderman nor under provision of statutes, 90 C 64

whether provisions in gift could be construed as conditions subsequent is not to be determined in absence of those who would benefit thereby, 98 C 129

all persons to be affected must be made parties, 102 C 401

if all interested are parties, and vested interest involved, necessary questions will be answered, 106 C 141

court proceeded to dispose of questions affecting unborn children who might be interested where in part decision was favorable to them and in part their living parents had an identity of interest, 109 C 569

that interests of unborn children might be affected cannot prevent adjudication as to plaintiff's present right, 128 C 12

upon occasion a will may be construed though persons subsequently born may have an interest, 128 C 386

§ 55 Wills

—whether decision would be binding upon such persons who might claim an interest, *quaere*, 128 C 386

effect of appointment of guardian ad litem for unborn persons who might claim interest in estate, 128 C 391

§ 56. —Costs, Expenses, Counsel Fees

whether particular legatee should share expenses of such suit by executor, 32 C 488
suit by legatee to recover amount due and for construction; *held* expenses not to come out of the estate but only the ordinary costs taxed, 50 C 574

statute as to allowance and costs is declaratory, 65 C 161

allowance to parties is a judicial act and cannot be delegated to clerk or left to agreement of parties; if not included in judgment as specific part of it, it cannot thereafter be made, 72 C 29

in proceedings by executors for construction of will allowances for counsel fees may be made to parties at discretion of court, 72 C 327

where suit involved only one-third of estate, costs were imposed on that third, 72 C 494

after final judgment in construction of a will, power cannot be retained for purpose of determining counsel fees, 82 C 189

costs to be borne by entire estate, though only one trust fund involved, 102 C 503

in will reservation suit, costs allowed out of that portion of estate involved in suit, 105 C 112

where questions were as to rights of adopted daughter of one of testator's sisters to take share in residue given to sisters for life, but others interested contested claim and would have profited had it been decided against daughter, costs and counsel fees to be paid from whole residue, 105 C 756

action for declaratory judgment to determine whether stock dividends are principal or income, improper, as suit by trustee for advice would serve purpose, 128 C 427

—but since action was treated as one for declaratory judgment, allowances for expenses and counsel fees not made, 128 C 427

§ 57. Conversion

what law determines whether will works conversion of land into personalty, 70 C 195

effect of directions for mingling real and personal estate in one common residuum; nature and requisites of conversion; intent controls, 70 C 214

direction to executor to sell lands and, after paying certain debts, to distribute proceeds,

works conversion; who may claim it, 71 C 521

use of word "proceeds" does not require a conversion, 72 C 29

direction to sell with bequest of proceeds to foreigners works conversion, 74 C 138
conversion occurs at testator's death, 75 C 502, 691

direction to "pay over" does not require property to be converted into money, 77 C 71
directions to trustees to invest fund and gradually use or pay it over, with grant of power of sale, *held* to indicate intent to convert, 81 C 171

where will contemplates conversion of estate, and trustee converts it and pays proceeds to son and legatee, his heirs can claim nothing as "ancestral" estate, 81 C 171

where land given as a legacy is condemned, the money received stands in its place, 82 C 378

conversion; gift of proceeds of sale of real estate is regarded as a gift of personalty from the date of testator's death even though it is sold much later, 83 C 235

a gift of proceeds of sale of real estate is specific and is a gift of personalty by conversion, 85 C 490

doctrine of equitable conversion is application of principle that equity regards as done what ought to be done, 123 C 196

—money directed to be employed in purchase of land or land directed to be sold and turned into money are considered that species of property into which will or other instrument directs it converted, 123 C 196

where executor instead of selling real estate in residue as directed in will, distributed it to college as part of residue, real estate to be treated as personal property for purposes pertaining to settlement of estate, 123 C 196

—it retained its nature as personalty until college by election through acceptance of distribution of it in original state worked reconversion of it into real estate, 123 C 196

—and not until distribution (November, 1935) did college's right to exemption attach to the real estate, 123 C 196

—and taxes, levied thereon by town, as of October 1st, 1935, and previously were valid, 123 C 196

when same person is entitled to receive bequest whether it remains in form of realty or be sold and converted into money (as directed by will) that person may elect to take either, 123 C 196

—election to take the former effects reconversion, but until right of election is actually exercised by some explicit action, property bears same character as if conversion were actually made, 123 C 196

§ 58. Legacies and Devises

§ 59. —In General; Rights and Duties of Legatees and Devisees

legacy is not a satisfaction of a debt due, unless so expressed or necessarily implied, 1 R 160

action will not lie for taking personal property belonging to plaintiff as heir at law before distributed to him, 1 D 150

the sole remedy of devisees to review probate order is by appeal, 6 C 264

substitution by changing real into personal estate does not affect rights of devisees, 8 C 348

devisees take as heirs, if estate is devised precisely as it would have descended, 19 C 318

a general devise carries all that testator had at death, 21 C 554

bequest by implication may arise when, 22 C 378, 73 C 670

property whose use is restricted according to trustee's assent is a devisable interest, 22 C 462

devise of "all property I die possessed of," applies only to property owned, 22 C 462

residuary clause dividing remainder of property among legatees in proportion to their legacies *held* absolute gift to each legatee although some of legacies contingent, 33 C 281

in general, whatever passes to administrator of intestate as assets is devisable, 40 C 343

devise construed as in lieu of dower, when, 42 C 276

debt secured by mortgage incurred by third person and afterwards assumed by son of testator *held* not within a provision releasing mortgage debts "in my favor against any of my children," 46 C 236

legacy, and in codicil legacy of same amount; latter *held* an additional bequest, 46 C 248

provision that heirs of life devisee take under existing statutes of distribution *held* heirs take as devisees of testator, not as heirs of life owner, 47 C 349

husband's rights attach to bequest to wife unless clearly excluded, 49 C 52

residuary legatees of unexpended income as well as principal of the trust fund may question executor's charges against income, 49 C 533

legacy deducting amount due at testator's death; legatee may claim legacy and also contest the amount due from him, 51 C 154

—language *held* to refer to the identity of debts due, rather than to state accurately the amounts, 51 C 154

words "I give, devise and bequeath" import present interest unless different intention is clearly manifest, 53 C 281

two different legacies will be presumed to be cumulative in absence of any direction to the contrary, 53 C 290, 56 C 152, 76 C 269

bequest to widow of two-thirds of the entire income from personal property, and one-half of real estate, *held* to exclude dower, 55 C 256

bequest of personal property to sons "after payment of my debts"; devise of real estate to daughters; *held* debts included a mortgage on the real estate, 59 C 455

any individual of a class benefited by a bequest may apply for appointment of a trustee, 60 C 325

suit to construe a will can be properly brought only by an executor, administrator c. t. a., or a trustee, 63 C 300

—heirs and legatees have no right to ask the court to advise de their controversies, 63 C 300

gift of life estates in income, conditioned on payment of legacies, charges these on income, or, if unpaid, on principal at end of life estate, 65 C 222

rights of devisee cannot be impaired by alienation of estate, 66 C 401

resident of Connecticut claiming legacy in estate in settlement in New York must resort there for his remedy, 67 C 24

—ancillary administration and garnishment of dividends of Connecticut corporation here will not avail, 67 C 24

devisee of mortgaged land is entitled to receive it freed from the mortgage, 68 C 198, 74 C 459, 78 C 481

devise of land in which testator has only mortgage interest will pass that, 69 C 416

gift of whole income as gift of principal, 73 C 58, 93 C 69

"to be divided" imports gift, 73 C 64, 87 C 664

if will gives property to heir, he takes by descent, 73 C 674

legacy to A in legal effect a gift to him, and to his issue in case he should not survive testator, 74 C 144

legatee *prima facie* entitled to one legacy only, 74 C 576

distinction between debt and legacy, 76 C 267

statute as to right of heirs of "brother" to whom devise is made and who dies before testator includes half brother, 79 C 562

ejectment maintainable by widow for lands specifically devised to her, if leased by administrator cum testamento annexo as her agent, 81 C 218

a gift in general of all goods and personal property does not convey the real estate, 81 C 547

§ 59 Wills

right of legatee not affected because literal fulfillment of condition of legacy is rendered impossible by act of law, 82 C 378

gift of a mortgage is a gift of personal estate, 85 C 490

specific devisee of real estate is entitled to immediate possession and can bring action to remove cloud, 85 C 567

clause in a will "I give, devise and bequeath" *held* sufficient to pass title to real estate, 86 C 282

accepting stock as a bequest makes legatee liable to assessments on it as though originally owned, 86 C 462

stock over which husband never exercised statutory right considered property of the wife, 86 C 463

devisee not a purchaser; building may remain a fixture on land devised, 86 C 544

title to real estate passes to devisees at death if will proved here; not so if will proved in another State only, 86 C 706

direction to pay to certain persons certain portions of a trust after death of life tenant is a gift of principal, 88 C 269

devisees of real estate share in proceeds of its sale as per their interest under the will, 90 C 143, 98 C 333

legal title of personal property of deceased is in executor; after judgment on the debts goes to heirs; realty goes directly to heirs, 90 C 561

power of court to determine legatees, 90 C 592

heir cannot sue as such for fraud in securing transfer of property during testator's life, 91 C 514

—nor for damages in securing execution and admission of probate of will of incompetent, 91 C 514

legatee has right to have premises turned over to him by trustee free from a lease, 91 C 667

heirs and legatees can waive rights in their own favor but not provisions of will such as provision for forfeiture if will is contested, 92 C 168

agreement to thwart testator's intent or validate void trust not enforced, 92 C 179

gift of income to wife and daughter, to former for life, to latter till marriage, gives each one-half, wife taking all on death or marriage of daughter, 98 C 274

—if she dies unmarried sum becomes intestate estate, 98 C 274

—interest begins one year after testator's death, 98 C 274

gift of lot "outright" to wife to be leased or sold and proceeds applied in reduction of mortgages on premises of which she had been given the life use, 99 C 562

—wife *held* bound to apply proceeds as directed, taking surplus, if any, absolutely, 99 C 562

provision for payment of binding notes not a legacy; notes were ante-mortem claims and deductible from gross estate before determining widow's fractional share, 101 C 699

where executors carry on business with all of estate except farm specifically devised, devisee not estopped to claim farm as exempt from business debts, 103 C 353

specific devisee derives title and right to possession directly from will; certificates of distribution and devise merely clarify land records, 103 C 354

devisees acquire title from will; heir-at-law from statute, 104 C 97

gift of "certain" shares of capital stock constituting "portion of my estate" not sufficient to show intent to dispose of certain portion of his estate and so to carry stock dividend declared before death, 106 C 19

—particularly where by codicil testator made special provision as to one such dividend, 106 C 19

after death of life tenant of residue, vested remainderman is entitled to principal provided gifts of annuities are secured; remainderman also entitled to excess income from annuity fund, 109 C 7

estate of aunt, residuary legatee under will, entitled to commuted value of unpaid instalments of testator's war insurance coming to testator's administrator, 116 C 266

—the fact that aunt was herself beneficiary to receive certain instalments in the first instance does not affect result, 116 C 266

—analogy to situation where life tenant falls within description of residuary legatees or next of kin to whom remainder interest is given, 116 C 271

it is only upon delivery of personal property to beneficiary through legal distribution after administration is complete that he acquires legal title, 123 C 196

where portion is set aside in trust without provision for its disposition at end of that use, remainder goes to make up deficiencies in particular legacies in preference to bequest to residuary legatee, 124 C 578

—testator may vary rule by provisions showing such intent, 124 C 578

—so where, at termination of trust, funds were "to become part of my residuary estate," language did not show intent to vary usual rule of law, and they went first to satisfy unpaid particular legacies in preference to residuary legatee, 124 C 579

words "pecuniary legacies" are broad enough to include rights to receive income of trust, 128 C 570

§ 60. —Classification of Legacies

bequest of "my East Haddam bank stock,"
held a specific legacy, 16 C 1
specific legacy defined, 16 C 7

devise of all rest and residue of property,
real and personal, is general devise, 16 C 9

bequest of "one-eighth of real and personal
estate at cash value," held a pecuniary leg-
acy, 20 C 337

bequest to wife of "all property she brought
with her at time of marriage" though part
consisted of notes is specific, 22 C 521

gift payable in certain stock generally with-
out reference to particular stock owned by
testator is general legacy, 53 C 107

devise of undivided interest in quarry, held
not a gift of a specific article, 58 C 139

demonstrative legacies, 73 C 58, 75 C 693

whether will which provides for payment of
certain sums for life out of dividends of
stocks which executor is directed to hold,
for annual payment of balance of income
to others, and giving remainder to latter,
constitutes specific legacy, *quaere*, 81 C 90

specific and general legacies distinguished;
proceeds of sale of specific land, 85 C 490

—specific legacy does not abate in favor of
a general, 85 C 490

where one's only interest in New York real
estate is a mortgage, it is personal prop-
erty; a gift thereof, though in form of a
devise, is effective, 85 C 490

devise of furniture, bric-a-brac, etc., is spe-
cific even though it includes a list of nu-
merous articles, 85 C 491

bequest of shares of stock in certain corpo-
ration construed as general legacy ordi-
narily, 101 C 359

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—bequest of two hundred and fifty shares
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where money left to pay taxes and repairs exhausted estate, a special trust could not be converted to meet these expenses, 91 C 620

where certain charges are to be divided proportionately among certain legatees, and one legacy is payable in instalments, *held* that charges are apportioned in accordance with amount originally provided in will, 95 C 123

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widow may recall her election to take dower, and claim under will; especially before any order of distribution is made, 51 C 435

acts of sons to whom property was left "after payment of my debts," *held* an acceptance of bequest; they became liable for payment of debts, 59 C 456

the acceptance of a benefit imposes also the burdens attached thereto by the will, 59 C 464

wife cannot take under antenuptial contract and have dower in addition, 59 C 576

devise of property to husband with right to use what was necessary for his support with a remainder over; husband also tenant by curtesy; *held* he took by curtesy rather than devise, 62 C 430

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legatee who elects to take beneficial interest under will cannot set up any right or claim which will defeat or prevent full effect and operation of any part of will, 74 C 96

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effect of election of widow to take statutory life use in place of provision for her in will as regards remainder over after life use given her, 100 C 367

—so where life use in will was to terminate on remarriage, 100 C 367

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—general legacies are first to be taken, before specific devises or legacies are to be disturbed, 120 C 77

distribution to husband in lieu of statutory share under will including real estate life use of which was specifically devised to him subject to conditions, with remainder to charitable trust, *held* void and property should be turned over to trust immediately, 120 C 77

§ 63. —Lapsed and Void Legacies and Devises

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where a charitable trust fails for lack of beneficiaries, fund becomes intestate estate, 50 C 501

invalidity of gift over did not invalidate whole bequest, the two being severable, 60 C 499

where income of trust fund was divided among certain legatees, and remainder over was void, *held* upon death of any legatee a proportionate part of the funds became divested of the trust, and was distributable as intestate estate, 61 C 14

—therefore portion did not increase income of surviving legatees or accumulate as a fund, 61 C 14

bequests to certain collateral relatives by name; some died in lifetime of testatrix; *held* bequests lapsed, 62 C 140

implied intent to disinherit nearer relatives cannot prevent the application of rule as to lapses, 62 C 142

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gift over at death of N, should all three of testator's children be then living, lapses on death of any of them, 74 C 128

by statute, legacy to brother in legal effect gift to him and to his issue in case he should not survive testator; no lapse by reason of his death, 74 C 144

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- gift of income to church, but if it should dissolve or abandon purpose, then over, did not lapse when church was merged with others in one united church and technically dissolved, 120 C 27
- where trust is invalid, and would fall into residue, which is also invalid, property is intestate, 128 C 16
- where there is absolute gift to one person with provision that in event of his death before a certain time another should take by executory devise or bequest, and latter gift fails, the absolute interest in first donee is unaffected and passes to his heirs, 129 C 137
- thus where gift of principal to A, but if he died before life tenant then to church society, and latter gift lapsed and A died before life tenant, A's heir took, 129 C 137
- ### § 63(2). Effect and Disposition of Lapsed Gifts
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- invalidity of a portion of bequest *held* not to invalidate entire bequest, it being severable, 60 C 499
- gift of four-fifths residue to four daughters in trust, with life use of income and a limited portion of principal if expedient; remaining one-fifth to children of deceased son; remainder over invalid; *held* remainder became intestate estate, 60 C 499
- widow receiving gift in lieu of dower, *held* not entitled to share in such intestate estate, 60 C 499
- bequest to children of deceased son *held* valid; entitled also to one-fourth of intestate estate, 60 C 499
- three daughters (one dying prior to testator) *held* entitled each to one-fourth of intestate estate, 60 C 499
- also to a life use of one-third of the one-fourth bequeathed to children of deceased son, 60 C 499
- amount of principal each daughter might take in her trust fund, *held* to be based upon the amount of fund before deducting the intestate estate, 60 C 499
- remainder, invalid as against Statute against Perpetuities, *held* to become intestate estate, 61 C 21
- therefore portion did not increase income of surviving legatees or accumulate as fund, 61 C 22
- gift of estate in trust, income to daughter for life; where remainder over invalid, fee vests in daughter as heir-at-law subject to trust, 61 C 189
- gift in trust to sons with restraint upon alienation; restraint, if invalid, did not render bequest void, 63 C 277
- separable provision may be void, but leave rest of bequest unaffected, 70 C 294
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- a gift over that is void passes under general residuary clause, 85 C 135
- a particular bequest shows intent that it shall not become part of residuary estate; but does not prove that, in case legacy should fail, the property should not go to residuary legatee, 85 C 135
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- separate provision may be void, but may leave rest of bequest unaffected, 85 C 172
- invalidity of one share, due to Statute against Perpetuities, does not affect other provisions if they can be separated, 86 C 218
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invalidity of remainder will not defeat or enlarge life estate, 86 C 220

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trust to C for life, then to continue for her "children or said children's heirs" with no gift of principal; gift to C valid, gift to others separable and invalid, and trust fund becomes intestate estate on death of C, 93 C 472

void gift of personalty passes under general residuary clause; of realty, becomes intestate, 97 C 246

lapsed gift of portion of residue becomes intestate, 101 C 142

invalidity of one provision in trust does not invalidate remainder, 105 C 262

in gift to life tenant then to issue or, in default of issue, to husband of life tenant and his heirs, invalidity of gift over to issue does not affect the alternative remainder to husband, 106 C 514

—this vested on death of testatrix, 106 C 514

where testator failed to provide for disposition of large part of income of a trust fund and gave no direction for accumulation but directed certain payments of income to remaindermen, *held* surplus income was intestate estate, 106 C 627

right to income of beneficiary who died before termination of trust until trust terminated became part of residue, 128 C 567

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§ 64. —Ademption of Legacies; Advancements

deed in consideration of love and affection presumed to be an advancement, 3 C 34

—this presumption is rebuttable, 3 C 34

—where valuable consideration is merely nominal, 3 C 35

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—where wife carries out husband's intention without authority, 6 C 311

gifts to children are presumed to be advancements, 6 C 360

meaning of term advancement as used in distribution of estates, 7 C 1

in distribution under will among children advancements are to be brought in and made subject of distribution according to provisions of will, 7 C 1

intent governs as to whether property is gift, advancement, or partly each, 16 C 383, 20 C 325, 46 C 211

estate specifically devised not to be treated as advancement in the distribution, 17 C 545

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right to charge as an advancement must exist at time of conveyance, 23 C 520

gift not to be subsequently changed to advancement without consent of donee, 23 C 520

—if changed to a gift, not to be changed back to advancement without consent, 23 C 521

charging sum as advancement without transfer does not deprive child of full share of intestate estate, 23 C 521

property, part advancement and part gift, cannot be charged as wholly advancement, 23 C 521

advancements by remainderman for repairs or support of life tenant a charge against property in which life estate exists; not to operate retroactively, 42 C 209

receipt for legacy by prior will, does not affect a legacy by later will, 45 C 63

advancement is the giving by anticipation of the whole or part of child's presumptive share, 45 C 87

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—not implied from payment in response to demand in discharge of legal obligation, 46 C 212

advancement *held* not to be included in division of a trust fund under a will, 49 C 48

advancement is the absolute property of the person to whom it is made, 49 C 49

testator cannot recall and make advancement part of a testamentary trust fund, 49 C 50

—not bound to bear proportionate loss in trust fund, 49 C 50

receipt given by legatee with agreement not to contest will *held* not to estop son from taking appeal from probate of will, 49 C 456

a subsequent legacy, without referring to former advancement, entitles legatee to whole of legacy, 56 C 152

—especially where legacy is expressed to be "in addition to what I have given him before," 56 C 152

—the will is the last and the controlling utterance of the testator, 56 C 166

acknowledgment of legatee that advancement should be deducted from legacy, made without knowledge of release in will, does not reimpose legal obligation, 56 C 152

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in a general legacy payable from general assets, intention is of the essence of ademption, 56 C 240

payment by testator in his lifetime to legatee is an ademption of legacy if he so intends, 56 C 240

—a receipt given for such payment is of no particular force, as the matter is not one of contract at all, 56 C 246

ademption of a general and of a specific legacy depend upon different principles, 56 C 243

—the latter is adeemed when testator has disposed of the subject matter in his lifetime, 56 C 243

joint and several note by husband and wife given as advancement; afterwards by will husband gave property to wife she agreeing to pay note if it was not paid in his lifetime, 61 C 206

—wife took property charged with trust of paying whatever was due on the note, 61 C 209

—*held* property given by will constituted a sufficient consideration, 61 C 210

—where original note was partially paid and the new note, substituted for balance, provided for interest, wife *held* bound to pay interest, 61 C 211

direction in will to include in inventory of estate amounts charged on testator's books to his several children does not make such advancements assets of the estate, 64 C 414

advancements not included, where widow is given one-third of estate, 64 C 419

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when legacy is revoked or adeemed; where will directs sale of property to pay legacies, and testator then disposes of property and takes mortgage back, no ademption, 75 C 683

intention determines whether advancement or loan; former can be converted into latter only by consent; declarations of parent as evidence, 78 C 334

where testator devises mortgaged land and then quitclaims equity to devisee, no ademption; executor must pay mortgage, 79 C 360

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residue of trust *held* not to be distributed until widow's death and anticipatory payments not permitted, 87 C 385

loan by testator to his daughter, *held* on the facts not to be an advancement, 97 C 480

giving of general pecuniary bequests to persons who are afterward in the will named as executors does not modify absolute gifts to the same people as executors "to be distributed at their discretion," 99 C 598

to avoid ademption, bequest of shares of stock in certain corporation is ordinarily construed as general legacy, 101 C 359

—but this yields to intent, 101 C 359

—as where testator himself provides against ademption by adding to bequest an equivalent in case he ceases to own stock, 101 C 359

specific bequest of stock not adeemed by reduction in par value between date of will and death, 101 C 359

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§ 65(1). In General; Order of Payment

title of legatee to bequest is perfect on assent of executor, 21 C 148

—such assent implied from what acts, 21 C 148

as general rule legacies are to be paid out of personalty, 21 C 550

—though all personalty be acquired after making will, 21 C 554

—parol evidence of intent to pay legacies from realty, inadmissible, 21 C 555

assumpsit lies for a legacy due; right to recover is not dependent on action of Probate Court, 32 C 422

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legacy of "\$200 in gold," in 1865; *held* payable in gold, 35 C 109

excess received by certain legatees may be required to be paid to others, 42 C 330

—payment *held* a condition subsequent, or a mere debt on accepting the legacies, 42 C 330

life legatee of personalty; statute de bond applies to all cases, 44 C 461

—such legatee not entitled to legacy without application and bond, unless testator or remainderman otherwise direct, 44 C 461

bequest in lieu of dower, and bequest to daughter, to be paid in full before other legacies, *held* not on same plane, 52 C 311

—bequest in lieu of dower to be paid first, 52 C 311

a receipt in full given for part of a legacy, under mistake, is no bar to a recovery of the whole legacy, 56 C 152

—declarations of testator to executors, in absence of legatee, *held* inadmissible against legatee, 56 C 152

legatees derive title through administrator; Connecticut resident claiming legacy in estate in settlement in New York must resort there for his remedy, 67 C 24

where successive paragraphs made gifts to sons and daughters and first contained

clause, "after payment of legacies," this was applied to all, 72 C 253

if mortgagee takes mortgaged land, devisee is entitled to reimbursement, 74 C 100

where gift is payable out of certain fund, and, in connection with it, testator "also" gives another legacy, this, too, is payable from fund, 75 C 684

"two-thirds of all the personal property of which I may die possessed"; debts, etc., to be first paid, 76 C 263

direction to "pay over" does not require property to be converted into money, 77 C 71

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gift of fund in trust to pay over income; after fund is set apart, legatee is entitled to actual income; effect of excess payments of interest, 77 C 94

annuity payable from "net annual income"; deficiencies not to be carried over from one year to the next, 78 C 606

specific legacy does not abate in favor of a general, 85 C 490

where gift is to a corporation, which has merged with another, it may be paid to the latter, 87 C 397

each legatee must pay the succession tax on his share unless will clearly indicates otherwise, 89 C 190

request that certain legacies be paid in full means they shall have priority, not that succession tax shall not be taken out of them, 89 C 190

method of paying annuity an administrative question, 102 C 318

distributees of cash estate entitled to legal tender; but any other mutually satisfactory plan may be adopted, 104 C 271

ante-mortem creditor or legatee to whom overpayment is made, must refund; but not post-mortem creditor, 106 C 602

where certain legacies given payable from residue, balance then given to another, and this followed by further legacy to be paid before "such balance" was paid over, quoted words *held* to refer to balance after previous gifts made, so that gifts preceding it were first paid in full, 112 C 82

"to pay one per cent" of net estate meant payment in money, not in kind, 117 C 377

where estate is insufficient to discharge all legacies and devises, general legacies abate before specific devises or legacies, 120 C 91

legacies of \$5000 "or the equivalent thereof," etc.; intent that they be paid in cash if available otherwise out of such property as constituted assets, 121 C 106

where portion is set aside in trust without provision for its disposition at end of that use, remainder goes to make up deficiencies in particular legacies in preference to bequest to residuary legatee, 124 C 578

—testator may vary rule by provisions showing such intent, 124 C 578

—so where at termination of trust funds were "to become part of my residuary estate," language did not show intent to vary usual rule of law, and they went first to satisfy unpaid particular legacies in preference to residuary legatee, 124 C 579

proper method of applying partial payments upon legacy is first to discharge interest due and then use balance available to reduce principal sum, 124 C 579

method of applying available funds where testator provided for interest at a given rate on certain legacies and trusts until settlement of estate, and balance presently available not sufficient to pay legacies and trusts in full, 124 C 579

§ 65(2). Time; Amount; Accretions and Interest

interest recoverable on a legacy which was directed by the testator to be put upon interest, 1 R 419

where bequest of one-half of real estate at appraisal in money, *held* to be no deduction therefrom for debts, 2 R 271

residuary legatee entitled to contingent legacy is also entitled to its interest, 12 C 350

specific legacy *held* entitled to principal sum deposited in savings bank and interest accrued thereon, 22 C 521

unless there is a clear intent to the contrary, legacies and devises vest in right at the time the will becomes operative even though payment may be deferred, 33 C 294, 57 C 295

provision as to time legacy is to be paid *held* applicable to that legacy only, 36 C 365

trust for support of grandchildren; contingency; time of distribution, 38 C 26

specific legacy vests immediately, except where contrary intent appears expressly or by implication; example of latter, 42 C 330

legatees, being surviving partners, must account for profits during settlement of estate, 42 C 330

—executors *held* entitled to inspect their books, 42 C 330

bequest of income of entire property to sister, with gifts over; by codicil gift to A of an annuity; *held* annuity began from death of testator, 50 C 574

—deferred payments would draw interest, 50 C 574

"the entire rents and profits remaining after payments of debts and charges," *held* a designation of the estate which was to produce the income, not a fixing of the time to commence paying over the rents and profits, 51 C 207

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legatees of income, contesting will, *held* not estopped thereby from claiming income which accrued during contest, 51 C 207

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legatee may sue in assumpsit for income improperly withheld, 51 C 208

taxes, repairs and expenses of managing estate should be deducted from income of life estate, 51 C 212

—also repair of bridge though of a permanent character, 51 C 213

life legatee of income cannot demand it while validity of will is contested, 51 C 215

—executor therefore may properly deposit same in savings bank, 51 C 215

—loss resulting from bank's failure falls on life legatee, 51 C 216

distribution to be when "youngest grandchild shall attain age of eighteen," *held* to mean youngest at death of testator, 52 C 239

bequest payable in a year from testator's death, *held* not to carry interest until end of year, 53 C 102

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rule as to interest on legacies, and exceptions to rule, 53 C 106

testator gave wife use of entire estate for life; by codicil he gave \$1000 each to two charities; *held* latter not subject to life estate, but to be paid at usual time, 53 C 489

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life legatee of residue, *held* entitled to interest on such residue, as finally ascertained, from testator's death, where no time was fixed by will for commencement of the life use, 56 C 423

certain legacies *held* not postponed in terms until termination of a life estate, though other legacies were so postponed, 58 C 329

legacies are payable one year from death; exceptions, 71 C 521, 76 C 561, 77 C 54, 711, 78 C 704

where legacy is payable when legatee reaches the age of twenty-one, interest runs from then, 71 C 521, 77 C 54, 78 C 704

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—though will directed "first payment" to be six months after trustee receives fund, 74 C 218

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legacy of income for life or term of years entitled legatee to income from testator's death, 77 C 51, 81 C 509

—if trustee is appointed, executor should turn property over to him; provisions as to quarterly payments not applicable until estate is turned over, 77 C 57, 81 C 509

—how amount of income is determined before fund is separated, 77 C 57, 94

direction to leave property in corporation for certain period postpones payment of legacies from it, 77 C 180

where one share in excess net income is given to S, to be paid as soon after end of year as it is ascertainable, and S dies seven months after one distribution, his administrator not entitled to income for that period, 79 C 548

widow, to whom land is specifically devised for widowhood, has title and right of possession from testator's death, 81 C 218

direction to executor to divide estate as soon as possible after death does not make that date rather than death of testator the one from which life beneficiary computes his income, 81 C 509

a beneficiary for life is entitled to use of clear residue as ascertained at testator's death, 81 C 509

under will, accumulation of income is added to principal of entire fund, not principal of respective shares, 82 C 533

specific devise of land and buildings carries with it the right of immediate possession and entitles devisee to bring a suit for a wrongful conveyance, 85 C 567

interest in educational trust *held* to vest at testatrix' death in living child, but to cease at child's death and then be distributed under the will, 86 C 90

gift to A to be paid when he is twenty-one; sum should be put in trust; when he is of age, he is entitled to receive principal and interest, 87 C 175

trust to pay wife \$500 a month with provision for certain legacies and a gift of the residue; legacies are to be paid subject to retaining enough to pay wife's income; residue not to be divided until wife's death, 87 C 384

—surplus of income becomes part of the principal, 87 C 384

—also interest payable before wife's death but not collected, 87 C 384

accumulated income of fund given in remainder passes as part of the fund, 89 C 270

where life use of residue is given, directly or in trust, beneficiary is entitled to income from death of testator, 96 C 176

—if in trust and estate not settled during first period fixed for payment of income, it is to be treated as income of first period, 96 C 176

where fund given to daughter payable on her marriage, income to accrue meanwhile, interest begins one year after testator's death, 98 C 274

legatee of certain sum bequeathed in trust entitled to income from testator's death, 102 C 318

—and if no sum set aside, average rate earned by estate applies, 102 C 318

where trust fund to consist of bonds chosen by trustee, beneficiary entitled to income earned since testator's death by the bonds selected, 102 C 318

devisee entitled to immediate possession; right to sell land, 103 C 373

title to real estate is acquired at testator's death; title to personalty at time of distribution, 104 C 97

testator may postpone payment of principal to devisee giving him income only, though no one else is interested, 105 C 261

specific legacy vests on testator's death; legatee entitled to all income or increment subsequently accruing, 106 C 19

gift of one-half residue is general legacy and does not carry income, 108 C 101

—income becomes part of principal of residue, 108 C 101

—but gift of other one-half residue to trustees for life tenants carries income, to be distributed to them, 108 C 101

right of life tenant to income from death, 110 C 48

direction to trustee "to pay over and deliver" share of residue at death of life tenant means to transfer it then, 112 C 109

residue in trust for wife and children; if "net estate" exceeded million dollars executors to pay 1 per cent to brothers and sister; executors in determining amount of net estate to base legacies on amount remaining after paying taxes and charges; *held* amount of "net estate" to be determined by executors as of time of distribution not date of death, 117 C 370

—in case of uncertainty any party may invoke jurisdiction of Probate Court, 117 C 370

—valuation on basis of assets remaining after payment of specific bequests and charges and after adding income during settlement to which beneficiaries of trust are not entitled, 117 C 370

—legacies to brothers and sister, being outright gifts, not entitled to any part of income earned during administration, 117 C 370

—these legacies payable in cash, not in kind, 117 C 370

—statute as to appointment of persons to divide testate estate where no persons appointed by will, does not apply, 117 C 370

those given life use of trust fund are entitled to so much of income accruing after testator's death and prior to distribution as has accrued on portion of estate distributed to trust, 117 C 376

—belongs to them as incident of life uses created, 117 C 377

on termination of trust of residue it was to be distributed, \$5000 "or the equivalent thereof" to P, etc.; residue consisted of mortgages and real estate; trustee had been given power to sell real estate and invest proceeds during trust; *held* intent was that legacies be paid in cash if available otherwise out of such property as constituted assets, 121 C 106

—latter alternative permitting distribution of undivided interests in real estate, 121 C 106

interest on legacies from time when payable, 121 S 106

unpaid balance of legacy, upon which will directs that interest be paid, continues to draw interest until it is fully discharged, 124 C 579

where testator provided that if certain contingency occurred, share should be paid to hospital, hospital entitled to immediate payment on happening of contingency, irrespective of effect on other gifts of income, 127 C 654

—amount of this share should be determined on basis of values as of time of distribution, 127 C 654

—relative amounts to be paid donees of income should not be affected by this distribution of portion of fund; formula for determining reduced amounts to them, 127 C 668

where real and personal property is given on conditional limitation, beneficiary is entitled to possession of real property on settlement of estate, 129 C 350

personal property should also be delivered to him without any security on order of Probate Court, 129 C 350

—recourse of any interested party seeking security would not be to Probate Court but to court having general equitable powers, 129 C 350

§ 66. Distribution

See also § 65, *supra*

§ 67. —In General; Ascertainment of Distributees and Their Shares

distribution by freeholders appointed by court, is valid under statute, where will makes no provision, 7 C 22

unnecessary to appoint distributors of cash, 16 C 317

—Probate Court competent to determine who are heirs, to receive cash, 16 C 319

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Probate and Superior Courts recognize equity jurisprudence in distribution, 17 C 187
where will provides rule for distribution it must be followed, 19 C 313
bequest to sons to counterbalance disparity of shares under will of mother, 23 C 579
"one-ninth of my estate" presumably means ninth of net amount, 27 C 134
Statute of Distributions should be followed where intent is doubtful, 33 C 222, 62 C 499, 63 C 377
stock transferred absolutely by executor to wife by mistake; remedy by minor injured is by suit on executor's bond, 39 C 149
"portion," construed as not including share in residuum, 40 C 250
reappraisal is proper, if necessary to just and equal distribution, 42 C 346
good will of the business, if continued, to be valued in estimating testator's interest, 42 C 347
income from realty not specifically devised, does not go into residuum, 44 C 512
—executor has care and control for benefit of those entitled to real estate, 44 C 512
—rents and profits, if not needed for debts to go with it, 44 C 512
estate devised to daughter, and thence by descent to son of daughter, is no longer ancestral, 46 C 119
executor not bound to distribute estate charged with life annuity until death of annuitant, 46 C 179
Superior Court has no power to order payment of shares before division under will, 46 C 180
—and until executor has neglected or refused to pay, after such distribution, 46 C 180
Probate Court may order a partial distribution, when, 46 C 181
language of will *held* to indicate that legatee was to receive one-fourth of avails of land when sold, 49 C 339
distribution to be when "youngest grandchild shall attain age of eighteen," *held* to mean youngest living at death of testator, 52 C 238
bequest of annuities; remainder in trust for ten years, then two-thirds of income to be paid to annuitants; *held* two-thirds income was in addition to annuities, 53 C 261
bequest to widow of two-thirds entire income of personal property and one-half of real estate, *held* to exclude dower, 55 C 256
"share" and "portion" *held* more applicable to fee than to life estate, 55 C 361
—"portion" more applicable to prospective division than to a distributed share, 55 C 359
"between" more properly applies to two persons or classes, than more, 56 C 158

bequest in trust for needy heirs, *held* applicable to those who would take under Statute of Distribution, 57 C 151
bequest to wife of one-third of the personalty absolutely, and use for life of one-third of real estate, remainder to daughter in fee; property allowed to continue in partnership which later became a company; relative rights in stock of company *held* the same as in the original property at testator's decease, 58 C 120
—widow *held* not entitled to full share of increase in value of property as profits, 58 C 120
—nor to earnings not distributed but preserved as surplus, 58 C 120
shares of beneficiaries in complicated provision decided; effect of one gift being *held* intestate, 60 C 498
"share" *held*, under circumstances, to refer to the corpus, rather than income, 61 C 66
devise to grandson C, residue one-half to son A, one-half to son B for life, remainder of B's share to C; *held* B's share did not include realty given by a former clause, 62 C 89
—"share" presumed to have same meaning in subsequent clause, 62 C 89
distribution must recognize, but cannot impose conditions on estate; distribution of property subject to life use; if substance of will carried out, manner not very material; where executors directed to repair homestead during life of life tenant, 64 C 40
where, on distribution of property subject to life use, property remains in executor's hands till life tenant and remaindermen are deceased, representatives of latter are entitled to it, 64 C 344
gift of one-third of residue to wife, and two-thirds to children with provision that amount charged on testator's books against latter be included in inventory, but deducted from their share; how that share is determined, 64 C 414
where widow is given one-third of estate, this is ascertained as at testator's death; does not include advancements, 64 C 419
provision for unequal division of fund, after termination of life estates, and for payment of annuities, with different provisions for distribution of each part, 65 C 510
—even after death of annuitants, distribution is as of date of testator's death, 65 C 510
provision for distribution at certain time, with later provisions for life interests inconsistent therewith; distribution postponed, 65 C 511
proceeds of real estate sold to be treated as real estate in determining rights of parties to share in them, 66 C 410

gift of sum to A "and her husband," *held* each took one-half, 70 C 44

if will disposes of land as it would pass under Statute of Distributions, legatees take as heirs, 70 C 287, 73 C 58, 674

fire insurance for fire after testator's death to be distributed as real estate, 72 C 29

after giving unequal annuities, testator provided for division of surplus income among annuitants; *held* that they took in proportion to their annuities, 73 C 57

two-thirds of "all the estate of which I die possessed" means after paying debts, 76 C 263

stock may be distributed in fractional parts, 81 C 91

personal property set out to legatee on condition that it be not declared income is legally transferred as soon as court declares it to be principal, 81 C 510

will *held* to show intent to treat children and their children equally, 81 C 525

under terms of will the homestead was allotted to the half of the residue of which niece took life use; "balance over" meant residue after deducting homestead, 82 C 158

"moiety" means one-half, 83 C 17

where property is left to "legal heirs" according to law of distribution, such law governs; children of deceased first cousins cannot take estate which would have gone to their parents if living, 83 C 342

equality of distribution between widow, daughter, and granddaughter *held* to be testator's intention; sentences transposed to accomplish this, 84 C 684

power to determine legatee may involve passing on validity of trust, 90 C 593

gift over to heirs of sons, to be divided equally, according to the law of distribution; *held* heirs take equally, not in proportion law fixes, 92 C 408

gift of income to wife and daughter, to former for life and to latter till marriage, gives each one-half, wife taking all on marriage of daughter, 98 C 274

proceeds of real estate sold by order of court, to be distributed as the realty would have been, 98 C 333

election by widow to take life estate under statute constitutes surrender of all interest under will; effect on remainders, 100 C 367

mutual distribution same in testate as in intestate estates, 104 C 97

word "balance" construed to include share of income given for life to child who died before termination of trust, 108 C 100

life estate in one-third of property after payment of debts correctly computed without first deducting specific legacies, 111 C 589

if there was residuum after paying all legacies, it should be divided among legatees in proportion to their bequests; *held* division should be made on basis of personal property only, 113 C 618

distribution of remainder after life use of one son to his heirs a partial one of testator's estate, where another son having life use of other part then survived, 116 C 396

validity of provisions of will devising remainder interests to heirs of life tenants not finally adjudicated by decree distributing remainder interest after death of one of them, 116 C 396

where there has been partial distribution of estate, upon final distribution any inequalities which have been created by earlier order may be rectified, 116 C 396

—such action does not involve any question of conclusiveness of earlier decree, 116 C 396

where parties claiming in later distribution do not make claim to property distributed in earlier partial distribution, and did not know of invalidity of remainder then distributed, they are not guilty of laches, 116 C 396

M left real estate in trust for two sons, to go to each one's heirs at his death; distribution to heirs of one son made at his death, and at death of other son parties ask declaratory judgment, it being then admitted that gift of remainders was void; *held* that distribution of this remainder is matter exclusively in jurisdiction of Probate Court and cannot be directed by Superior Court in first instance, 116 C 396

—that in final distribution equities arising from illegal distribution of first remainder are to be regarded, 116 C 396

statute de appointment of persons to divide testate estate; Probate Court has no jurisdiction to appoint distributors if testator appoints some person unless he becomes incapacitated, 117 C 374

—provision directing executors how to determine amount of net estate carried clear implication of intent that they should determine its amount, at least in first instance, 117 C 370

determination of net estate, if made by distributors appointed by Probate Court would be based on value of assets at time of distribution, 117 C 375

statute that Probate Court shall ascertain heirs and distributees "so far as the will may leave the same indefinite and necessary to be defined"; in performing that duty court has jurisdiction to determine incidental questions, 117 C 376

—such as, in instant case, whether "net estate" amounts to million dollars under

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- terms of will, if there is uncertainty, 117 C 376
- distribution to husband in lieu of statutory share under will including real estate life use of which was specifically devised to him subject to conditions, with remainder to charitable trust, *held* void and property should be turned over to trust immediately, 120 C 77
- Courts of Probate have full and exclusive jurisdiction of the settlement of estates, including power and duty to ascertain distributees so far as will may leave same indefinite and necessary to be defined, 120 C 97
- in performing its duty court has jurisdiction to determine such incidental questions as are necessary to a correct conclusion, 120 C 97
- cases where applied, 120 C 97
- in present case construction of will as to meaning of next of kin including first and second cousins *held* incidental and necessary, 120 C 97
- function of trustee ends with acceptance of final account and distribution reverts to Court of Probate, 121 C 106
- which may order sale of any of real estate if advantageous or necessary, 121 C 106
- sale warranted if character of real estate such that it cannot be beneficially divided, 121 C 106
- distribution to be made according to value at time thereof, 121 C 106
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- § 68. —Per Stirpes and Per Capita**
- division “between wife and children”; *held* they took per capita, 20 C 122
- “to be equally divided, each having equal portion”; per capita division intended, 21 C 616
- bequest to “heirs” is to be divided per stirpes, 25 C 387
- real estate to wife for life, remainder to children and their heirs respectively, to be divided in equal shares between them; testator had four children living at date of will and four who had died, all leaving children; surviving children and representatives of deceased children to share equally, 31 C 183
- devise to children, and children of deceased child, share and share alike; *held* they took per stirpes, 33 C 222
- bequest “to be equally divided between A and her children, B and her children, and children of deceased”; *held* beneficiaries took per stirpes, 39 C 189
- legatees take per stirpes, when, 45 C 472

- terms of will construed to mean a division per stirpes, 49 C 220
- per stirpes division has long been held a just one, 49 C 223
- will be applied where language leaves intent in serious doubt, 49 C 220
- property “to be equally divided between said children to wit: of said J and said M”; *held* legatee took per stirpes, 55 C 158
- gift to five children of A, to two children of B, a deceased son of A, and a child of C, also a deceased son of A, the issue of any that should have died to take parent’s share; *held* children of B took per stirpes one-seventh of whole, 62 C 499
- “the remnants to be divided pro rata among the heirs,” *held* to mean a per stirpes distribution, 63 C 377
- in doubtful cases the Statute of Distributions should be followed, 63 C 377
- when will directs residue to be divided among testator’s heirs, they take per stirpes and not per capita, 67 C 249
- where legacies to specific persons and to classes of persons, a class to be treated as a unit under residuary clause providing for equal distribution of surplus over amount necessary to pay all legacies, 70 C 44
- “I give to my nephews and nieces (they being my lawful heirs)” all residue of property; *held* no ambiguity, and nieces and nephews take per capita, 70 C 283
- when the legal heirs entitled to take under a will consist of children and representatives of deceased children, they take per stirpes, 70 C 467
- per stirpes distribution preferred, 73 C 66, 74 C 228, 97 C 107, 111 C 1, 115 C 445
- sister and testator’s niece, his sole legal heirs, *held* to take equally, 82 C 158
- residuary estate *held* to be divided per capita, not per stirpes, 89 C 271
- division among a class “equally” imports per capita gift, 89 C 278
- per capita distribution favored when, 89 C 282
- after life estate, property to go to “my cousin M for herself and children”; *held* M took life estate only and remainder vested in her children per stirpes, 90 C 142
- gift over to G’s children, or said children’s heirs, *held* to require per stirpes distribution, 93 C 472
- “issue,” construed as descendants in every degree, will take per stirpes unless will directs otherwise, 98 C 337
- distribution per stirpes may be upheld where words “distributed equally” used if will otherwise discloses an intent to make a per stirpes distribution, 100 C 351
- provision in will that property shall be distributed equally to “all my grandchildren,”

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equality in distribution among lawful heirs requires per capita distribution, 105 C 110
in gift to lawful heirs, per stirpes distribution adopted where elsewhere in will per stirpes distribution is required, as otherwise inequality would result, 111 C 1

direction that estate be equally divided among beneficiaries requires a per stirpes division unless contrary intent appears, 115 C 443

§ 69. Miscellaneous Provisions concerning Management and Settlement

clause directing payment of all just debts does not revive a debt barred, 7 C 172

construction of clause providing for accumulation and disposition of funds, 12 C 350

clause charging debt on A, who was a legatee and also executor, *held* a personal charge on A, 22 C 595

clause that vacancy in trusteeship should be filled by one nominated to the judge of probate by at least one-third "the devisees above named"; *held* those only who were to take at the termination of the trust were the "devisees above named," 54 C 320

direction to sell "all my real estate and effects" means real and personal property, 55 C 168

a general direction to pay debts without restriction means all debts, secured or unsecured, 59 C 456

in determining value of estate for purpose of fixing excess over certain amount, homestead valued at an amount directed by testator, 82 C 159

"charges" means not the succession tax, but testamentary expenses, 89 C 190

testator must clearly so state, if he wishes succession tax paid from residue; otherwise it comes out of each legatee, 89 C 190

request that each legacy be paid in full means that they have priority, not that the succession tax shall not be taken out of them, 89 C 190

money left to pay taxes and repairs exhausted estate; will construed that certain real estate could be sold to meet them, 91 C 620

—a special trust could not be converted for that purpose, 91 C 620

what taxes included within direction to pay "all inheritance or other taxes," 102 C 318

"just debts and funeral expenses" does not include legacies unless this intent appears, 111 C 589

payment of debts includes mortgage on land specifically devised which was guaranteed by testator, 113 C 62

article 1 of will provided that debts, funeral expenses, succession and other taxes be paid by the executor; *held* intent was that succession tax be not charged against legacies, 116 C 448

—testatrix presumed to have known, unless she directed otherwise, that succession taxes would be deducted from legacies, 116 C 448

—and fact that will was drawn by skilled and experienced draftsman fortifies this construction, 116 C 453

as practical effect of making legacy or devise free of tax is to increase gift, intent will not be drawn from vague language, 116 C 451

—but a few simple words will suffice to indicate intent, 116 C 451

provision in specific legacies that principal sum be preserved intact and left by legatees to children was precatory to legatees and not confirmation of intent that legacies should pass free of tax, 116 C 453

where residue was left in trust, income to be paid children and on their death principal to go to grandchildren, payments provided for upkeep of property left brother should be charged against principal of residue, not income, 121 C 682

provision for payment out of residue of "ordinary expenses for the general upkeep" of property left to brother and his wife for life, meant what was necessary to keep property in proper condition and repair for occupancy, 121 C 682

—replacements necessary for this limited purpose within, 121 C 682

—such as necessary new heating equipment; but supplying fuel to heat house not within, 121 C 682

under statute, taxes on transfers are payable primarily by executor or administrator with right to collect tax from donee or beneficiary or in case of trust from trustee, 122 C 126

—provision in will that inheritance and transfer taxes should be paid out of residue and not charged against beneficiaries, was not intended to include prior transfers inter vivos, 122 C 109

directing that all taxes "upon or in respect to" estate be paid from residue as applied to death taxes on inter vivos trust, 124 C 66

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WITNESSES

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WORKMEN'S COMPENSATION

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—to be counted within group one must be employee within act, 125 C 23

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—where testator drove horses rented to city to use with wagons owned by it in collection of ashes, city *held* liable, 114 C 546

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—collection of ashes was a part of its business and street was premises under its control, 114 C 546

—employee was not loaned to the city, 114 C 546

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—and latter not liable in action for negligence, 122 C 186

—that plaintiff at moment of accident had stopped work and was talking with another person, did not take him out of act, 122 C 186

that work was part or process in defendant's business and performed on premises under its control, nil sig. as to contractor, since statute relates to liability of principal to employee of contractor, 123 C 320

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—brewing company which contracted with P to erect its signs in package stores, not liable for injuries to P's employee, 125 C 109

—underlying purpose of restriction, 125 C 112

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—no liability in Community Chest employing contractor to erect sign in front of town hall, 125 C 729

where arrangement was that welding company would inspect leaking tank of defendant and report, but repairs not to be made without confirmation of defendant, relation of principal employer and contractor did not exist, and employee of welding company could sue defendant for injuries at common law, 127 C 316

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son, employed by firm of which father was a member, comes under the act, 91 C 380

musicians in employment of amusement park are its employees although engaged by leader of orchestra, 92 C 404

employee is one who serves at another's will and direction, both as to mode and manner of service and means used, 94 C 156, 95 C 419

one who works as a reporter in his spare time, but at other times at another occupation, is an employee of the newspaper while engaged in reporting, 94 C 156

independent contractor is one who in working for another is free from latter's direction and control respecting the mode, manner and means of accomplishing the undertaking, 94 C 156, 95 C 419

fireman is not a city employee; no contractual relation; does not come under act, 94 C 403

appointment of a public officer and his acceptance does not create a contract, 94 C 403

a boy eleven years old is an employee whether he could be lawfully employed or not, 95 C 160

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—though one hiring him furnishes some laborers to assist and assumes to give some directions, 96 C 633

person performing usual duties of hotel manager, though no wages fixed, *held* employee, 102 C 234

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where farmers exchange labor, one helping is employee within act, 102 C 471

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—but tree warden who does actual work under arrangement with town officers for compensation *held* to be an employee of city, 102 C 571

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—so when foreman on job took on care of boilers for extra compensation this not independent employment, 103 C 102

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an officer of a corporation taking work home *held* not to be an outworker, 105 C 512

abutting owner repairing sidewalk by direction of city *held* to be its employee, not a contractor, 105 C 545

claimant has burden of proving that he is an "employee," 105 C 545

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employee and independent contractor distinguished, 106 C 285, 107 C 143

—hiring of man and truck, on occasion in question driven by owner, *held* to establish latter relationship, 107 C 143

—that foreman on job could direct movements of truck and discharge driver does not prevent this result, 107 C 143

child under sixteen employed in violation of statute is within the act; contract of service, 111 C 229

minors entitled to benefits of act, are bound by it unless notice of nonacceptance or withdrawal filed as prescribed, 112 C 459

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—that in doing work claimant took no orders from anybody not sufficient to rebut claim of employment, 113 C 287

—corporation still had the right of control, 113 C 287

whether claimant was employee or independent contractor, 121 C 127

—method of compensation not of controlling importance, 121 C 127

—nor fact that plaintiff used own automobile, 121 C 127

—but defendant's admission that it had right to tell claimant how, when and where to work, that claimant was under its control, on its pay roll and it could discharge him, conclusive against commissioner's conclusion that he was independent contractor, 121 C 127

—and as this admission and failure of defendant to offer proof to combat it showed misapprehension of issues, case remanded for introduction of further testimony, 121 C 127

independent contractor is one who, exercising independent employment, contracts to do piece of work according to own methods and without being subject to control of his employer, except as result of work, 123 C 320

—finding that decedent in cleaning out ventilating shaft in restaurant was acting as independent contractor and not employee, sustained, 123 C 320

—that work was part or process in defendant's business and performed on premises under its control, nil sig., since statute relates to liability of principal to contractor's employees, 123 C 320

whether there was contract between State and employee paid by federal government under FERA through state relief commission created by Emergency Relief Commission Act, not decided, 123 C 512

—reserve fund set up by relief commission as substitute method of compensation, 123 C 505

—and plaintiff's acceptance of payments under it constitutes election wholly inconsistent with right to claim under Compensation Act, 123 C 505

method utilized to determine payment not of controlling significance; workman paid wages by piece or quantity within act same as one paid by day, 124 C 410

where defendant had general control over work done by radio repairman whom it paid so much per job, finding that he was employee sustained, 124 C 410

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- was employee and not independent contractor, 124 C 433
- relief worker working extra time on snow removal *held* to still have status of worker on relief, 126 C 266
- voluntary acceptance of work by relief worker creates contract between him and city and mutual relationship of employer and employee exists between them within terms of act, 126 C 266
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- person may be contractor as to part of his services and servant as to another part, 126 C 379
- right to compensation depends on particular relationship existing at time injury was suffered, 126 C 379
- plaintiff was working under his special contract to install weather stripping when injured, not on replacing window cords for which he was paid by hour, and was not entitled to compensation, 126 C 380

§ 8. —Casual Employees

- employee *held* not to be a "casual employee"; latter is employed only occasionally and incidentally at uncertain intervals, 90 C 445
- business may not require daily attendance of all employees, yet if each has stated duties, fixed wages, and no other occupation, they are regular, not casual employees, 92 C 404
- employee of a corporation who occasionally renders little services to officers in the expectation of a tip is not employee of such an officer, 94 C 487
- "casual employee"; boy employed for vacation to run errands *held* not to be such, 95 C 160
- "casual" employee defined, 102 C 337, 105 C 591
- special policeman to keep order in theater not casual employee, as he has been in continual service and employed for purpose of carrying on interests of city's police force, 102 C 337
- one employed for other purpose than employer's trade or business not excluded unless employment also casual, 105 C 591
- schoolgirl regularly employed after school hours in doing housework, *held* not to be a casual employee, 105 C 591
- casual employee not excluded unless employed otherwise than for purpose of employer's trade or business, 107 C 189
- whether latter condition is met ordinarily question of degree and helpful test is, would work ordinarily be performed by regular employees, 107 C 189
- generally speaking work in repairing or adding to factory building does not meet test, 107 C 189

- but maintenance of building in good condition for manufacturing does, as cleaning, washing windows, 107 C 189
 - window washer employed by contractor for that work permitted recovery, 107 C 189
 - exception of casual workers to be narrowly construed, 107 C 359
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 - employment of carpenter at hourly wage to build loading platform and shelves for warehouse, work to take several weeks, not casual, 107 C 359
 - hence not necessary to consider whether work was otherwise than for employer's trade or business, 107 C 359
 - plaintiff injured in erecting stand for defendant to display his meats, vegetables and fruits; *held* he was employed "for the purposes of employer's trade or business" and entitled to compensation, 118 C 367
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 - Legislature intended to give principal's own employees broader claim upon him than employees of contractor, 119 C 224
 - so repairing roof of church, incidental powers of which included maintaining its real estate, was "for purpose of employer's trade or business," 119 C 224
 - momentary withdrawal from active work not necessarily cessation of employment, 122 C 185
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 - employment to remove rubbish from store at least once a week, 122 C 186
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contributions to support of mother may prove partial dependency, 89 C 144

dependency may exist though contributions are irregular in time and amount and recipient may have other income, 89 C 144

contributions need not approximate \$5 per week to cause dependency; in partial dependency commissioner may award statutory amount, 89 C 144

commissioner *held* to have properly found one claimant partially and one wholly dependent, 89 C 368

father physically unable to work and having no other income dependent on minor son regardless of whether son is a financial asset and whether his death is a financial injury to father, 90 C 255

presumption under the act of dependency of husband on wife does not arise until wife's injuries, 90 C 255

duty of dependent to remove physical incapacity if reasonably possible, 90 C 258

in absence of any dependents, State alone can claim payments, 91 C 226

ability to earn a living is not inconsistent with dependency, 91 C 226

no dependency if one has sufficient means to supply present necessities according to his position, 91 C 226, 95 C 160, 670

dependency is determined by facts at time of injury, 91 C 226

—support to exact time of injury not necessary, but a long cessation may preclude compensation, 91 C 226

dependency is tested by whether one relies upon contributions for living expenses, 91 C 226, 95 C 670

son employed by firm of which father was a member is not excluded from the act; his sister *held* next of kin and dependent, 91 C 380

dependent defined; statute conclusively presumes certain persons are such, 92 C 454

—one able to sustain himself without assistance not a dependent, 92 C 454

son who is of age *held* not to be a dependent, though he received intermittent help, 92 C 454

nature of dependents' rights; amount due him not to be reduced by payments to employee before his death, 93 C 155

illegitimate children are included in family for purposes of compensation, 93 C 423

unmarried woman living with a man as his wife not entitled to compensation, 93 C 423

father is entitled to earnings of minor son, 95 C 160

wife living with husband presumed to be supported by him, not by son; not a dependent of the son, 95 C 160

contributions made beyond the family necessities are for investment, and not contemplated by act as basis of dependency, 95 C 670

father who receives wages of a minor son and puts them in a fund to buy a house is not thereby a dependent, 95 C 670

use of wages for reasonable savings is not inconsistent with dependency, 95 C 670

mother partially dependent on child's earnings, 96 C 124

apportionment to those partially dependent, 96 C 124

sister *held* dependent who relied on decedent's earnings though his contributions were voluntary and not enforceable, 96 C 295

our act provides for compensation to those dependents who have a legal right to compel support and to those who receive support from voluntary contributions, 96 C 296

dependency is based on actual dependency; legal right to demand support not alone enough, it may exist where there is no legal right to support, 96 C 296

—or where there are others of whom the claimed dependent can legally demand support, 96 C 296

"family" in law *held* to refer to the relationship rather than actual living together, 97 C 110

—would include partially dependent sister living out of State, 97 C 111

distribution between partially dependent sister resident in this country and alien parents, 97 C 111

—where former receives from one-half of "the normal compensation" all that she had been receiving from the deceased, the portion of the other half which may not be taken by aliens reverts to the employer, 97 C 111

provision as to nonresident aliens *held* not invalidated by equal rights clause in treaty, and it is not unreasonable, 97 C 212

treaty between United States and Italy does not forbid discrimination based solely on residence, 97 C 219

award may be reduced where measure of dependence has decreased, 97 C 332

one may be partially dependent though owning property and having some income, 97 C 688

weekly contributions by son, who lives with mother, beyond his fair board, periodic contributions for rent, telephone bills and for her clothing are properly regarded, 97 C 688

—not contributions for painting a room, which was not a continuing or annually recurring expense, 97 C 688

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as regards contribution of son to mother, *held* consideration of her obligations towards minor daughter not limited to time until she is eighteen, as it is for commissioner then to take any proper action in view of the changed condition then arising, 97 C 688

not inequitable to measure amount of dependency by sums contributed when employee received higher wages than when injured, 97 C 688

dependency is question of fact which need not be proved by mathematical calculation, 97 C 689

where employee had made intermittent remittances to wife in Poland she was entitled to minimum of \$5 a week, although this exceeded average amount actually sent her, 100 C 345

conclusion of dependency presents question of law, 100 C 345

after death of original dependent, "other dependents" need not give new notice of claim, 101 C 109

finding made on award to employee conclusive upon subsequent claim made by his dependents after his death; may be incorporated by reference in second finding, 103 C 701, 105 C 415

statute requires apportionment of compensation in case of pre-existing disease, but this does not apply to awards to dependents, 103 C 701, 104 C 709

where employee dies from injury his widow as dependent is individually entitled to award for his death, 105 C 398

effect of abandonment by husband of wife and child as regards her right to award as child's dependent, 105 C 415

son gave entire earnings of \$20 to mother, who supplied board worth \$10 and spending money of \$1.50; mother *held* entitled to award of \$10 per week, 105 C 415

dependency of mother on minor son, not determined by whether he was financial asset to her, or his death a financial injury, 105 C 415

dependency, and extent of it, are conclusions to be drawn from subordinate facts, 105 C 421

dependency is a question of fact; finding conclusive unless unsupported by subordinate facts, 106 C 233

where person not related and not living in same household contributed to support of minor child, she is not member of his family within the statutes, 106 C 233

—such membership necessary condition of dependency, 106 C 235

who are members of the "family"; collectivity of residence and unity of headship necessary, 106 C 235

dependency essential to claim for death; claimant has right to prove it, 107 C 454

dependency is question of fact, 112 C 233

—that employee has made no contributions to claimant not conclusive that latter is not a dependent, 112 C 233

—but is strong, often compelling, evidence that he is not, 112 C 236

minor may have dependents, 112 C 459

though father is under legal obligation to furnish maintenance of mother, this fact not inconsistent with reliance by latter on money furnished by son, 119 C 37

dependent is one who has relied on decedent for support and who has reasonable expectation that support will continue, 119 C 37

—test not whether sums received necessary for support of life, but question to be judged by class and position, 119 C 40

—analogy in definition of "necessaries" furnished minor, 119 C 41

partial dependency may exist though contributions be at irregular intervals and irregular in amounts and though dependent have other means of support, 119 C 37

son accustomed to contribute half wages to mother who used them for household expenses supplemented when necessary by money from father who maintained house; \$300 in bank in joint account with father; mother *held* partially dependent on son, 119 C 37

one is not dependent who has present means at hand for supplying present necessities, 119 C 41

—presumption that wife living with husband whose earnings are adequate to support family is supported by him; rebuttable, 119 C 42

—mere fact of money in bank not inconsistent with status of dependency, where sum not large or not available, 119 C 37

deceased gave father entire weekly wage of \$18.80 on which father relied, together with own earnings, to support family of three; *held* father entitled to \$9.40 compensation, not \$5 minimum as awarded by commissioner, 120 C 35

—that he spent only \$13.75 for son's maintenance, nil sig., as measure was total amount contributed, 120 C 35

—test is, not whether contributions are necessary to support life, but whether they were relied on for means of living according to class and position, 120 C 35

widow having signed voluntary agreement for compensation for husband's incapacity, releasing all future claims in any capacity, could not make claim as widow after his death, 120 C 280

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widow or widower, conclusively presumed to be wholly dependent by statute, entitled to entire award, 127 C 394

—right of others, determined to be dependent upon facts, to share arises only upon death or remarriage of widow or widower, 127 C 394

§ 10. Notice of Injury and Claim

requirement of notice one of essential elements of claim; is matter of substantive right, not merely of procedure, 90 C 218

in provision that no "want," defect or inaccuracy of notice should bar proceedings unless employer was prejudiced, "want" of notice meant lack thereof, 90 C 218

—failure to give employer any notice would not preclude claim, 90 C 218

—but employer could show ignorance of injury and prejudice as offset, 90 C 218

requirement that notice of claim be given "within one year from the date of the injury" means date when it becomes compensable, or when injury incapacitates employee for period of more than seven days from earning full wages at his customary employment, 96 C 414

—hence where hernia was caused more than a year before, but incapacity began within the year, employee is not barred, 96 C 414

failure to notify employer of injury does not bar recovery of medical expenses, 98 C 738

under act no proceedings for compensation are maintainable unless written notice of claim therefor is made within one year from date of injury, 98 C 770

—the time thus prescribed is a condition embedded in the right itself, 98 C 770

—distinction between written claim for compensation to be given within one year and notice of injury, 98 C 776

notice of claim for compensation must be given within one year though effects of injury not discovered until later, 100 C 423

—notice of injury not equivalent to claim for compensation, 100 C 423

failure to give notice of claim bars recovery; not excused upon equitable grounds, 100 C 426

notice of claim must disclose intent to claim compensation, 100 C 426

"injury" which employee must report is a compensable injury; not required to notify at time of accident, but only when he has suffered sufficient incapacity to entitle him to compensation, 100 C 533, 114 C 31

where strain suffered but employee continues work though suffering until another strain occurs which incapacitates him, employer not legally prejudiced by failure to give notice of first, 100 C 533

—extent of reduction allowable on this account, 100 C 533

—no prejudice if it does not appear that something might have been done to decrease injury, 100 C 533

notice of claim for compensation not necessary for those who become entitled to balance of award on remarriage of widow, 101 C 109

—hearing on claim within one year brings them within provision making claim unnecessary in such case, 101 C 109

purpose of notice of claim, 101 C 116

what is meant by giving a notice "immediately," 108 C 309

defeat of attempt of plaintiff to proceed against employer at common law, ground for extension of time to claim compensation, 109 C 469

notice on behalf of minor to be given by parent or guardian, 112 C 463

giving employer and commissioner written notice of claim within year is condition precedent, except in the situations named in statute, 112 C 579

—these are jurisdictional requirements and cannot be waived, 112 C 579

—promise by employer to pay under terms of act on employee's agreement not to report to commissioner, insufficient basis of jurisdiction, 112 C 579

employer not prejudiced by lack of statutory notice where full notice in fact, 112 C 582

where employee ultimately incapacitated by grinder's consumption some years after he left one employment, in the interval working for others, time for filing claim ran from incapacity, not from leaving employment, 116 C 193

where finding did not fix date when claimant's right to compensation for pneumoconiosis first arose, neither Superior Court nor Supreme Court could say that commissioner's conclusion that notice was "seasonably given" was correct, 117 C 603

—decision of this question by Superior Court, upon assumption that injury and incapacity dated from 1924, not warranted, 117 C 603

previous to 1927 notice was required to be given within one year from date of injury, 117 C 606

—since then within year from date of accident or from first manifestation of symptom of occupational disease, 117 C 606

—under old statute, notice in pneumoconiosis case must be given within one year from date when injury first became compensable, 117 C 606

law to be applied is that in effect when plaintiff's right to compensation arose, that is, when incapacity occurred, 118 C 301

—act of 1927, re-enacted in 1929, controlling where incapacity occurred in 1932, 118 C 301

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—and compensation refused where written notice thereof not given within one year from first manifestation of disease, though incapacity did not result until after expiration of one year, 118 C 299

—in such case employee can give notice that he will claim compensation should he be thereafter incapacitated, 118 C 299

“notice of claim” within year is something more than notice of injury required by other provision, 118 C 315

—under former, notice must be one reasonably informing employer that employee claims compensation, 118 C 315

—so that letter by claimant's physician to insurer as to his condition not sufficient notice of claim, 118 C 315

—requirement of written notice of claim is of essence of employee's right and failure to comply cannot be waived or avoided, 118 C 315

written notice of claim within one year “from the first manifestation of a symptom of the occupational disease,” 118 C 666

—symptom of disease to appear plainly, not to be merely suspected, 118 C 666

—notice not conditioned on actual knowledge but upon fact that symptom manifests itself, 118 C 666

—symptom is manifest if reasonable man would clearly recognize it, 118 C 666

—there must be clear recognition of the symptom as being that of the occupational disease in question, 118 C 666

—manifestation which sets time running means manifestation to the employee, 118 C 666

—and manifestation to his doctor alone not sufficient, 118 C 666

unless notice of claim given in accordance with act, commissioner without jurisdiction, 118 C 669

commissioner's conclusion that plaintiff had pneumoconiosis in 1924, and that earning capacity partially destroyed then, sustained, and rights and obligations fixed by law then in force, 120 C 456

—and as law then in force required notice within year from “date of injury,” i. e., date of compensable injury, and plaintiff did not give this he had no matured right to compensation, 120 C 456

—that he did not know that he had pneumoconiosis until 1932, nil sig., 120 C 456

right is only matured when compensable injury has been followed by notice to employer in accordance with statute, 120 C 456

as regards claim not arising from disease, 1927 amendment substituted, as time when notice must be given, in place of one year from date when injury became compensable

one year from date of accident or occurrence from which injury resulted, 125 C 290

—so where plaintiff injured by fall in 1933 but did not become incapacitated until 1938, where no notice filed within one year of accident commissioner correctly dismissed claim at hearing held in 1938, 125 C 290

§ 11. Compensable Injuries

§ 12. —In General; Definition; Susceptibility to Injury

personal injury means same kind of injury for which recovery could be had at common law but not occupational diseases; case of lead poisoning, 90 C 349

physical condition of employee making for susceptibility to injury does not preclude compensation, 90 C 539, 92 C 461, 110 C 248

bodily injury is a localized abnormal condition of the living body caused by accident, 91 C 158

definition of “personal injury,” 91 C 162

“accidental bodily injury” defined, 93 C 153

“compensable injury” means one for which compensation is payable, 96 C 418

—injury becomes such only when seven days' incapacity has resulted, 96 C 418

under act of 1919 the injury need not be located at a definite time and place, 98 C 646

personal injury means any harm or damage to health of employee, however caused, by accident, disease or otherwise, which arises in course of and out of his employment and incapacitates him in whole or in part, 100 C 541

“occurrence” defined, 103 C 93

compensable personal injury defined, 103 C 93, 720, 104 C 709, 111 C 193

—must produce incapacity for statutory period, 104 C 709

—need not be traced to any definite happening, 104 C 709

finding must show that death was caused by the injury, 105 C 394

includes every consequence of the primary injury, 105 C 656

amendments and decisions affecting definition of compensable injury reviewed, 111 C 188

compensation given only for personal injury and occupational disease, 111 C 192

incapacity as used in compensation law means incapacity to work, not loss of member or function, 113 C 707

word “injury” in act has reference ordinarily to action or event producing incapacity, 114 C 30

—but in certain instances refers to time when facts arose which entitle plaintiff to compensation, 114 C 31

where there is accidental injury definitely located as to time and place, existence of

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constitutional conditions or latent tendency predisposing employee to injury does not defeat recovery, 114 C 389

accidental bodily injury defined, 116 C 225

—accident may refer to all the conditions of employment which produced incapacity, 116 C 225

accidental injury must be definitely located as to time and place; time need not be fixed by stopwatch or place by mathematical point, 119 C 44

—where decedent drove about in high nervous excitement to get inhalator and then to scene of drowning and shortly died of thrombosis, injury definitely located between time of starting and leaving scene of drowning, 119 C 44

where disability from psychosis resulted from appendectomy and operations on left hernia and right hernia and latter only was injured in employment, conclusion that repair of right hernia caused psychosis erroneous, 122 C 592

—other cases where new injury, or aggravation of original injury resulting from medical or surgical treatment, was not directly traceable to original injury but arose from intervention of independent cause, cited, 122 C 597

when employer is liable for injury, he is also liable for any additional bodily harm resulting from acts done by third persons in rendering aid which injury reasonably requires, 122 C 593

—as applied to medical, surgical or hospital treatment, liable only for additional injuries which result from risks normally recognized as inherent in necessity of submitting to such treatment, 122 C 593

—and not for harm caused by misconduct which is extraordinary and outside such risks, 122 C 593

compensation does not depend on condition of health of employee or freedom from constitutional weakness or latent tendency, 123 C 188

—if injury is cause of disability it is compensable though such an injury might not have caused disability to a healthy or even average employee, 123 C 188

where plaintiff's present disability would not have resulted except for a second accident, and first employer had compensated him for first accident, employer at time of second accident responsible for full compensation, 123 C 188

where there is disability followed by specific indemnity and a subsequent disability, traceable to original injury, compensation will be granted for subsequent disability if it is not due to condition which was normal incident of original loss, 127 C 294

—so where there was compensable injury resulting in loss of vision, for which there were disability payments and then specific indemnity, subsequent loss of eye as result of original injury was compensable, 127 C 294

award not precluded because risk is one which has not become generally recognized or because only employees unusually susceptible will suffer from the disease, 128 C 499

—dermatitis was occupational disease with-in act though it was due to plaintiff's individual susceptibility to an unusual degree to fumes of antimony, 128 C 499

our law, unlike that in many other States, does not make basis of recovery in ordinary cases the occurrence of an accidental injury; provides compensation where "personal injury" is sustained, 128 C 611

if employment is immediate occasion of the injury, previous physical condition of employee is immaterial in determining whether there shall be award, 129 C 532

—rule applicable in case where janitor of school died as result of hemorrhage of aneurysm occurring while he was cleaning sidewalk of snow, though it had origin in congenitally weak spot, 129 C 532

—commissioner's ruling denying compensation because injury not due to any unusual activity incidental to employment, erroneous, 129 C 532

§ 13. —Arising out of and in the Course of Employment

§ 13(1). In General; Causal Connection

injury arises "out of and in the course of" employment when received while acting within scope of employment and when there is a causal connection between the conditions of the work and the injury, 90 C 116
scope of employment means doing work for which employee was hired and other work permitted by employer for their mutual benefit, 90 C 116

when employee turns aside from his employment for his own purposes without knowledge or assent of employer, he is not in the course of his employment, 90 C 116

"in the course of his employment" means within the period of employment at a place where employee may reasonably be while fulfilling duties of employment or something incidental to it; case of frostbite while driving from place to place, 90 C 303

injury arises out of employment when it is natural and necessary incident or consequence of employment, though not foreseen or expected, 90 C 303

if primary injury arises out of employment, everything that flows from it arises out of employment, 90 C 304, 102 C 6

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injury occurring in course of employment as a natural incident of it, though not foreseen, may arise directly or as an incident of employment or from conditions and exposure surrounding employment and is within the statute, 92 C 382

injuries likely to occur from character or condition of business and which should have been contemplated by employer arise out of employment, 92 C 382

employee injured from a risk of his employment when doing something incidental thereto with employer's consent is within scope of his employment, 93 C 57

injury to employee sustained while doing what he was employed to do and as a proximate result thereof arises out of employment, 93 C 151

injury which is a natural and necessary incident of employment is proximately caused thereby, 93 C 151

when employment carries greater exposure to injury than exposure to which persons are generally subject, injury is proximately caused by such exposure, 93 C 151

injury "arising out of" employment; employment as "cause," 93 C 581, 95 C 293, 97 C 49, 104 C 709

one found dead where his duty called him may be presumed to have been killed in the course of and as a consequence of his employment, 95 C 40

it is not necessary to prove that the employment, or some condition connected with it, was the proximate cause of the injury, 95 C 628

—some causal connection is necessary; but this does not arise simply because one was injured in the course of his employment, 95 C 628

injury arises out of employment, when, 98 C 753, 105 C 512, 698, 107 C 370, 109 C 178

—in course of employment, when, 98 C 753, 105 C 512, 698, 107 C 370, 109 C 178

must be a causal connection between work and injury, 100 C 383, 104 C 331

necessity that injury arise out of employment differentiates compensation under act from health insurance or disability or old age pension, 104 C 709

opinion of expert that injury "might have" arisen out of employment insufficient basis for finding that it did, 104 C 709

—reasonable probability must appear, 104 C 709

causal connection requires proof that the employment exposed the employee to greater risks than others would meet outside employment, 104 C 709

—hence where conditions of employment only produced same result as any employment would, injury not compensable, 104 C 709

necessity of causal connection between injury and employment; mere risk to which anyone was subject is not sufficient, 105 C 395, 656

injury cannot arise out of, unless it arises in course of, the employment; both elements defined, 105 C 512, 698, 107 C 370

finding that injury arose in course of employment must be supported by subordinate facts, 105 C 516

scope of employment covers not only employee's duties, but things permitted for mutual convenience, 105 C 695

injury, whether from accident or disease, materially and proximately caused by employment or its conditions is compensable, 106 C 360

—not so, if it would have occurred without those conditions or they play only an incidental part, 106 C 360

in production of results many circumstances often play a part so minor that the law will not recognize them as causes, 106 C 364

fact that injury contemporaneous with employment not enough, 107 C 57

—must be direct causal connection between it and employment or its conditions, 107 C 57

—and it must appear that had it not been for them injury would not have occurred, 107 C 57

—conclusion of commissioner that insanity of librarian, resulting in suicide, arose out of employment sustained, 107 C 57

—caution to be used where claim is that insanity arose out of employment, 107 C 62

finding that thrombus was present in body and was detached by fall causing death *held* supported by evidence, 107 C 165

—conclusion that it was caused by fall, supported by evidence, would also justify recovery, 107 C 165

—main reliance in such a case must be on medical testimony, 107 C 169

to arise out of employment there must be causal connection between injury and employment, or its conditions, 107 C 370, 108 C 493

effect of amendments of 1927 on terms "arising out of" and "in course of" employment, 109 C 378

—do not change pre-existing rules, 109 C 378

provision in 1927 law that to arise out of employment, injury must be "causally traceable" to it does not change previous rule, 109 C 473

—when injury is causally traceable to employment, 109 C 473

—we have adopted broad conception of employment as including injuries arising out of conditions in which it is carried on, 109 C 473

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whether recovery is sought for illness or injury, it must be proximate result of employment; proximate cause defined, 110 C 252

when injury arises in course of employment in general, 110 C 389

—this requirement relates to time, place and circumstances, 110 C 389

—arising out of employment refers to origin and cause, 110 C 389

—when injury does arise out of employment in general, 110 C 390

—what is incidental to employment, 110 C 390

—right of employee to rely on instructions of general manager, 110 C 389

compensable consequences though reaching as far as chain of causation remains unbroken do not include nervous state pertinent to injury only because they arise from compensation proceedings and anxiety about result, 116 C 229

—distinction from nervous upset or neurotic condition having causal relation with personal injury, 116 C 235

—analogy to law of torts de brooding over negligent conduct or danger to which it exposed party injured, 116 C 235

injury occurring within period of employment, at place where employee could properly be, and while he was reasonably doing something incidental to employment, arises in course of employment, 118 C 295

injury arising out of risk incident to conditions of employment, consented to by employer, arises out of employment, 118 C 295

whatever predisposing physical condition may exist, if employment is immediate occasion of injury it arises out of it because it develops within it, 119 C 44

there is a natural presumption that one charged with performance of duty, and found injured where duty required him to be, was injured in course of and as consequence of employment, 121 C 56

—and when decedent was killed within period of employment and at place where he might reasonably have been, whether he was then on employer's business question of fact for commissioner, 121 C 56

employer responsible if employment or conditions incident to it are efficient cause in production of incapacity, 121 C 486

injury received in course of employment does not cease to be one arising out of it merely because some infirmity due to disease has originally set in action final and proximate cause of injury, 122 C 343

—where fall on concrete floor caused fracture of skull held that constitutional weakness of employee, claimed by defendant to

be cause of fall, was not element to be considered in determining whether injury arose out of employment, 122 C 343

injury arising in course of employment ordinarily is result of risk incident to employment, 122 C 343

—act or omission for exclusive benefit of employee not ordinarily risk incident to employment, 122 C 348

—nor is injury incurred by employee voluntarily departing from his duties, 122 C 348

injury is compensable not because of extent or particular character of hazard but because it exists as one of conditions of employment, 122 C 344

—risk may be no different in degree or kind than those to which he may be exposed outside employment, 122 C 344

—so contention that as there was no defect in concrete floor liable to cause injuries, employee was not subject to greater risk than if he has been elsewhere and therefore injuries not result of hazard peculiar to employment, properly overruled, 122 C 344

—contra dissenting opinion, which holds that injury must be causally due to conditions which are peculiar to employment and not such exposures as the ordinary person is subjected to, (dis.) 122 C 350

when employment will be proximate cause of injury; greater exposure than that to which persons generally in that locality are subjected, 125 C 380

—hours decedent worked, together with physical exertion of his particular milk route, created such exposure, and injury resulting from heat stroke was compensable, 125 C 380

causal connection between employment and injury not essentially different from like causation at common law in negligence case, 128 C 240

in determining causal connection court is not concerned with possibilities but with reasonable probabilities, 129 C 672

§ 13(2). Temporary Cessation of Work; Acts for Benefit of Employee; Deviation; Skylarking

employee is not acting in course of his employment when turning aside from his work to heat a lunch bottle, even if employer knew of such a practice, 90 C 116

employee, departing temporarily from usual duty to do something for employer, still is in course of employment; shipping clerk helping move barrels, 90 C 539

injuries received in fight over a metal ladle do not arise out of employment, 92 C 382, 384

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foreman of road workers does not depart from employment in crossing street to talk with a friend, 93 C 49

employee injured while passing from one part of employer's premises to another to go on with his work is within the statute, 93 C 581

an employee of a company voluntarily doing some work for one of its officers is not in the course of his employment by the company; no contractual relation between officer and employee, 94 C 487

one in supervising capacity may be acting "in course of his employment" if he departs to do something irrelevant to his duty; if injured, it does not "arise out of" his employment, 95 C 627

injury not compensable where employee, who had received compensable injury, was going to doctor's office by direction of employer, and took a short cut over a railroad by a crossing not a public way, but considerably used, 96 C 343

injury where employee departs from course of employment for his own ends not compensable, 98 C 756

minor interruptions of work during day, or privileges accorded during noon hour for mutual benefit, not excluded from employment, 105 C 695

brief departure from specific duty does not take workman out of employment when, 107 C 370

—fall in attempting to tie shoestring before descending stairs in performance of duties, 107 C 370

laundress in hospital injured during noon hour while ironing curtains for her own room *held* not entitled to compensation, 107 C 512

—that injury arose during noon hour would not defeat recovery as that was incident to employment, 107 C 512

—but it did not appear that employer had consented to or even knew of use of machines at such a time by employees for such a purpose, 107 C 512

—temporary suspensions of work which do not break continuity of employment, 107 C 515

—permitting employee to do things as a personal privilege or for his exclusive personal benefit is not in act, 107 C 516

—but act outside continuity of employment permitted by employer for mutual benefit of both is compensable, 107 C 516

where employee on duty in undertaking establishment washed own car, recovery not sustainable after finding that it was for purpose of employer's business is stricken out, 107 C 640

injury arising out of horseplay not compensable, 109 C 473

—cases where injured employee was not a participant reviewed, 109 C 473

—we have never adopted broad rule allowing compensation whether injured party was participant or passive victim, 109 C 473

—sport or mischief of employee not risk of employment unless employer knows of practice and fails to stop it, 109 C 473

—where boy waiting in yard for time of work to begin was injured by sport of other employees and employer knew of practice and did nothing to stop it compensation allowed, 109 C 473

where employer merely permits act, without direction, nature of act often controlling in determining compensability, 111 C 365

—if for benefit of employee or mutual benefit of both, usually compensable, 111 C 365

—if for sole benefit of employee or someone else or for some cause apart from employment usually not, 111 C 365

—that employee not fulfilling any duty of employment is not conclusive, 111 C 367

—affording facilities for vaccination in time of smallpox epidemic, 111 C 365

where employee working overtime was injured in workroom during half hour for lunch, during which smoking was permitted, by his clothes becoming ignited from match used to light pipe, injury *held* to be compensable, 112 C 635

—acts by workman in ministering to his personal comforts or necessities which will not break course of employment, 112 C 639

—injury occurred in course of employment since deceased was doing, with permission, what he could reasonably do within time of employment and at a place permitted, 112 C 640

—injury was result of risk involved in or incident to employment or conditions under which it was to be performed, 112 C 640

that claimant was skylarking on truck before accident could not be held substantial factor in bringing about accident in getting off, 118 C 312

employee's saying truck was going too slow and he would get off and meet it on top of hill did not require finding that he had left master's business, 118 C 312

injury resulting to employee from fight with another employee; principles and cases determinative of whether injury arose out of employment reviewed; effect of anger or ill will; of cessation of strife; of passivity of claimant, 124 C 355

—question in this type of case one of fact; conclusion of commissioner must stand unless it is one he could not reasonably or legally reach, 124 C 355

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—where fight originated from anger of fellow employee at smoke from fire plaintiff made in accordance with method approved by employer, conclusion that injuries arose out of conditions of employment sustained, 124 C 355

injury to employee who, while waiting before greasing a mixer because it was not ready, went to boiler room and washed overalls and was burned, arose out of and during course of employment, 127 C 248

—case distinguished from those where there has been temporary cessation of employment and injury arose out of very act of employee for own benefit or that of another, 127 C 251

§ 13(3). Injuries Going to and from Work; Before and after Work; Traveling

injury may arise out of and in course of employment though suffered before actual work begins or after it has ceased, 92 C 82

—employee returning to employer's boat after shore leave and before time for boat to sail, injured on employer's premises; injury compensable, 92 C 82

master liable for death of workman going home in automobile engaged by employer to convey workmen to and from work, 92 C 87

employee of quarry stopping at company's store within danger zone on way home from work does not depart from employment; inference is that employer consented to it, 93 C 57

injury while employee riding to and from work pursuant to agreement arises out of employment, 93 C 82

employee going home killed on truck not then under control of master; *held* injury did not arise out of his employment; master did not furnish transportation, 95 C 287

employee injured returning to work over private way; peril *held* incident to employment and arose out of it, 95 C 408

—even though he might have gone to the factory over a highway less convenient, 95 C 408

where employer added trolley fare to wages of employees, but they were at liberty to use it or not for that purpose, one injured after leaving premises and while crossing road to catch ride on motor bus not entitled to compensation, 96 C 353

employee using his own car killed on return from trip on employer's business; death while traveling in line of duty, 98 C 544

basis of rule ordinarily forbidding recovery for injuries in use of highway going to and from work, 102 C 337, 105 C 512

—does not apply where employee is required to use highway as and when directed, 102 C 337

—injury to policeman on way to report for duty at police station recoverable, 102 C 337

—other instances of compensable injury on highways, 102 C 343, 105 C 512

where method of approach to place of employment exposes workman to peculiar risk, compensation depends on whether it was annexed as an incident to employment by express agreement or conduct of parties, 103 C 449

—using foot path through fields and crossing railroad tracks not at any regular crossing, 103 C 449

if injury arises from risk incidental to employment while employee is doing something to which employer has expressly or tacitly consented, it is compensable, 103 C 559

—though employee not then employed on his own particular work, 103 C 559

—employee riding to work in employer's truck, 103 C 559

period of employment includes reasonable time in passing to and from employment when this expressly or impliedly made incidental to employment, 105 C 695

—period ends when at close of day employee leaves area where employer has expressly or impliedly made it incidental to employment, 105 C 695

—injuries on way to and from work compensable, when, 105 C 702

injuries while riding to and from work in conveyance furnished by employer, 105 C 701

when dangerous approach to place of employment annexed thereto as incidental risk, 105 C 702

injury to traveling salesman on highway while on way to visit customer compensable, 107 C 165

exceptions to general rule forbidding recovery for injuries on highways, 107 C 502

—recovery supported where employee injured in crossing highway to board automobile furnished by employer to go to place of work, 107 C 502

—effect of requirement that employee report to certain person or place each morning, 107 C 507

—injury arising on employer's premises while employee preparing for work, 107 C 507

transportation in automobile as incident of employment, 108 C 630

injury while leaving employer's premises after work arises out of and in course of employment, 109 C 94

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- employment continues until employee has passed beyond premises, 109 C 94
- injury suffered by minister while abroad, engaged in getting material for lectures to be given under auspices of church *held* to arise in course of and out of his employment by it, 109 C 178
- that he was conducting tour for tourist agency in making trip will not prevent, 109 C 178
- one may be employee of more than one person at same time, 109 C 178
- where another injury was suffered on shipboard while claimant was returning, in absence of showing as to what duties he was then engaged upon, no recovery against church, 109 C 184
- ordinarily accidents on highway not compensable, 109 C 378
- but where carpenter, under orders to work at certain place, went out of his way to vote, with permission of employer, and was injured after leaving voting place and on way to work after hour when his pay began, injury compensable, 109 C 378
- he was in course of employment because in line of his duty in employer's business within hours of employment and where he had a right to be by employer's direction, 109 C 378
- injury arose out of employment because it arose out of travel on highway, occurred in course of employment and was causally traceable thereto, 109 C 378
- if injured while he was on the way to vote, though by permission of employer, and in hours of employment, he could not recover because he was serving his own purposes, 109 C 385
- injury while employee being transported to annual meeting for employees *held* compensable, 110 C 384
- the injury arose out of employment since it occurred in course of it and was proximate result of a risk involved in performance of duty incidental to employment, 110 C 384
- hazard of trip was annexed to employment as a risk incidental to it, 110 C 384
- case not one of mere invitation to enjoy hospitality of employer or gratuitous outing or picnic, 110 C 392
- presumption that where duty requires employee to be in certain place and he suffers injury there he was in course of employment, 111 C 532
- insurance agent injured Saturday night after visit to restaurant where he had talked insurance to employee, 111 C 533
- employee not ordinarily entitled to recover for injuries suffered on highway, 111 C 655
- as where employee injured while riding motorcycle to place of employment out of

- town, though employer paid him amount of railroad fare to place of employment, 111 C 655
- injury by upsetting of bus in which employer was transporting employees home from work was compensable, 112 C 461
- where employee took unusual route to place where he had duty to perform and was drowned by falling into lagoon, he was entitled to compensation, 114 C 519
- exception to rule that use of highways going to and returning from work not in course of employment, where such use is incidental to employment, and with knowledge and consent of employer, 115 C 665
- injury to employee from risk to which everyone is subjected does not arise out of employment; but if it is abnormal in the employment it arises out of it, being necessary incident thereto, 115 C 665
- where manager of grocery on way home late at night mailed report to employer and was killed as he turned away from mail box, recovery sustained, 115 C 665
- that he was killed while turning away from box not regarded as departure from employment and definite entry upon journey home so as to terminate right to compensation, 115 C 665
- that cause of killing was mistake in belief by assailant that he was carrying money does not avoid liability, 115 C 671
- plaintiff injured at noon while taking car out of employer's garage to replace truck with which he delivered ice; day's work completed except one delivery that afternoon which he was to make with own car for own convenience; use of garage "with knowledge and consent of employer" and one of actual conditions of employment; *held* injury compensable, 118 C 295
- sales manager of defendant killed while driving to convention in distant city in own automobile; use of automobile with knowledge and consent of company, and injury and death arose out of and in course of employment, 121 C 528
- test of "course of employment," 121 C 533
- cases de injury sustained from dangers of highway travel incidental to employment collected, 121 C 534
- conclusion sustained that hazard of crossing railroad tracks in short cut on way home was not annexed to employment by consent of employer, express or implied, 122 C 129
- where injury sustained by employee outside premises, from some peculiar danger in course taken or means used in coming to or going from work, it must appear that such danger was risk annexed to employment by employer's contemplating and acquiescing, 122 C 129

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exception of general rule that employees are not in course of employment when going to and from work is where employer contracts to and does furnish transportation, 125 C 238

—in such case the transportation is, by terms of employment, made incidental to it, 125 C 239

—employment may exist before actual work begins or continue after actual work has ceased, 125 C 239

—the exception does not exclude situations where agreement for conveyance is for one direction only or at a time which is prior to day of beginning work, if reasonable, 125 C 238

employer may annex to actual performance of work, as an incident of the employment, the going to or departure from the work, 127 C 528

—not necessary that employer authorize a particular method of travel, though this is important; enough if it is one within his reasonable contemplation, 127 C 528

—review of authorities, 127 C 531

—accident to employee while he was driving home in early morning from emergency work in one of employer's trucks arose out of and in course of employment, 127 C 528

where employee took motorcycle after work to do errand for employer and was injured on way to home of friend, his injury did not arise in course of nor out of employment, 129 C 240

injuries sustained on highway are not ordinarily compensable, 129 C 242

§ 13(4). Exposure to Elements

test where employment subjects employees to greater exposure to elements than others in same locality, 90 C 310

employee, exhausted from exposure, five days later had pneumonia; *held* not to have arisen in course of employment, 91 C 158

sunstroke is a personal injury, 93 C 151, 313

fact that employee was not more exposed to sun than other outdoor workers is immaterial, 93 C 151

sunstroke arises out of employment if it carries with it a risk from heat substantially greater than that of persons generally in that locality; teamster of coal wagon, 93 C 313

conclusion that solderer, working in tremendous heat, died of heat prostration *held* unsupportable in absence of findings concerning usual symptoms of disease and connection with employment, 104 C 459

only when exposure to natural causes is substantially greater than that to which persons are generally subjected, is injury therefrom compensable, 113 C 721

—heat exhaustion suffered by engineer of steam shovel *held* not compensable, 113 C 721

conclusion that exposure in course of employment was not contributing cause of death from pneumonia and not accidental injury, sustained on conflicting medical testimony, 119 C 1

pneumonia resulting from exposure incurred in highway construction is not occupational disease, 121 C 668

hours decedent worked, together with physical exertion of his particular milk route, created greater exposure than that to which persons generally in locality subjected, and injury resulting from heat stroke was compensable, 125 C 380

§ 13(5). Other Particular Cases

where accident happens during period of employment at place where employee should reasonably be, and he is reasonably doing his duties or something incidental thereto, it is in the course of employment; man fell asleep near stove, 92 C 274

employee *held* to be attempting to get into employer's boat, not to be showing off his skill as a swimmer when injured so as to take him out of the course of his employment, 92 C 404

one who is struck by lightning when taking shelter under a tree is acting within scope of employment, 94 C 7

a reporter killed while leaning out of a trolley window to see aeroplanes was acting within scope of employment, 94 C 156

injury resulting from a risk involved in or incident to the employment or condition under which one is required to work arises out of his employment; employee killed by accidental discharge of pistol in next room, 94 C 260

caretaker who, after he had chased boys away and had returned to work, was injured by the boys mischievously shooting an air gun at him, *held* injured in course of his employment, 94 C 377

boy eleven years old killed while crossing street on errand for master; *held* injury arose out of employment whether he was legally hired or not, 95 C 160

employee became faint from hearing a surgical operation retold and fell out of open door; *held* injury did not "arise out of" employment, 95 C 627

evidence that pneumonia was traumatic and the injury, received while employee was at work, was its exciting cause; other evidence that it was of systemic infection; commissioner's decision not changed, 96 C 295

injury from fall immediately due to vertigo, where danger of falling is a condition of

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the employment, arises out of employment, 97 C 46

—painter falling from scaffold by reason of attack of indigestion, 97 C 46

injury to night watchman going to get food for dog kept by order of factory superintendent, under his instruction to do so, *held* to warrant finding act applied, 98 C 286

traveling salesman injured while escaping from burning hotel at night; injury *held* to have arisen in course of, and "out of," his employment, 98 C 754

where employee, a janitor, was shot by another who became wholly insane while both were in course of employment, injury arose out of employment, 100 C 373

bare finding that plaintiff injured "while chasing boy from refrigerator" in employer's hotel, not sufficient to support conclusion that injury arose out of and in course of employment, 102 C 234

injury to hotel manager suffered while chasing boy from refrigerator *held* compensable, 103 C 760

where employee lighting cigarette in toilet against the rules set fire to his oil soaked clothes, no compensation allowed, 104 C 331

death of fireman due to fall from being pushed by visitor at engine house not compensable, 105 C 394

—injury did not arise out of employment because not natural or necessary consequence or incident of employment or its conditions, 105 C 394

—when injury arises out of employment, 105 C 394

inference that decedent walked into river and was drowned as result of heat exhaustion, *held* unwarranted, 104 C 535

employee *held* not to be "outworker" within meaning of statute, 105 C 512

employee who takes work home to complete, not then in course of employment, nor while returning with it, unless there is special agreement, express or implied, 105 C 512

mere contribution by employer toward use of automobile does not bring it within contract of employment, 105 C 512

employees on road construction job permitted, but not required, to sleep in barn furnished by employer, *held* injuries from fire in barn during night not in course of employment, 105 C 695

mail boy attempted to operate automatic elevator, in carrying mail from fourth floor of factory; *held* injury arose in course of employment, 106 C 250

work of stableman in mixing feed in room occupied by him, done with tacit consent of employer and for their mutual conven-

ience, *held* to be in course of employment, 107 C 374

angina pectoris resulting from excitement caused to president of employer corporation by angry threats made to him while pressing prosecution of defaulting employee in City Court *held* not compensable, 108 C 493

injury to cook while accompanying butler, her husband, who took care of employer's daughter with permission, on day off, did some errands at employer's request, and then became involved in accident on way home from calls on friends, did not arise out of and in course of employment, 128 C 488

§ 14. —Disease

personal injury includes diseases that are direct and immediate consequences of bodily injury, 90 C 303

erysipelas from a frost-bitten nose is a personal injury, 90 C 303

no award for disease except as a direct result of accident, 91 C 158

pneumonia developing from exhaustion and consequent cold is not a bodily injury within the act, 91 C 158

evidence that pneumonia was traumatic and the injury, received while employee was at work, was its exciting cause; other evidence that it was of systemic infection; commissioner's decision not changed, 96 C 295

occupational diseases are included in act by amendment of 1919, 97 C 548

under Chap. 142, § 1, Public Acts 1919, pneumonia may be an "injury," 98 C 650

progressive heart disease; *held* no causal connection between work and injury shown, 100 C 383

quaere as to effect of provision that injury need not be traced to definite occurrence, where commissioner finds that effect of work on disease would have been gradual and imperceptible at any particular time, 100 C 383

—that work and progress of disease were concomitant does not establish that they were correlative, 100 C 392

development of law relating to diseases, occupational or otherwise, traced and applied, 103 C 93

under act of 1919 all diseases, occupational or not, are included, 103 C 93

no distinction between occupational and non-occupational disease except when former of contagious, communicable or mental nature, 103 C 701

tuberculosis will rarely be within act unless resulting from bodily injury or occupation, 104 C 709

compensability of disease when proximately caused by employment, 104 C 724

grinder contracting pneumoconiosis and then disabled by resulting tuberculosis, *held* entitled to award, 105 C 651

cause of tuberculosis difficult of conclusive proof; function of commissioner where expert opinions conflict, 105 C 651

commissioner's conclusion from conflicting medical testimony is conclusive, 106 C 107

where medical testimony merely indicated that exposure in factory contributed in some undefined degree to produce grippe, award to claimant not sustained, 106 C 360

when conditions of employment peculiarly adapted to produce onset of disease, it is compensable even though disease is result of independent infection, 106 C 360

insanity arising out of overwork in employment as librarian *held* compensable, 107 C 57

tuberculosis from wet grinding, 107 C 64

where claimant's medical testimony held death to be due to heart disease resulting from burns received in employment and respondents claimed it to be due to shock, commissioner could not accept theory as to death being due to heart disease, yet deny causal connection between injury and death, where no medical testimony supported this conclusion, 107 C 73

no compensation allowable for scarlet fever contracted while in a hospital recovering from a compensable injury, 108 C 148

angina pectoris resulting from excitement caused to president of employer corporation by angry threats made to him while pressing prosecution of defaulting employee in City Court *held* not compensable, 108 C 493

grinder's consumption; doctor's evidence reviewed and *held* to support conclusion that incapacity primarily due to this cause, 109 C 62

failure of heart caused by climbing stairway on way from work *held* compensable, 109 C 94

heart condition not aggravated by work and death therefrom not compensable, 112 C 691

pneumoconiosis is occupational disease which may develop into tuberculosis; injury occurs when diseased condition arises; becomes compensable when employee is incapacitated, 114 C 24

compensation allowed for death due to heart strain while driving a hard-steering fire truck though there was long-existing heart disease, 114 C 389

finding of commissioner on conflicting evidence that death from pneumonia was not caused by conditions of employment must stand, 115 C 451

compensation allowed for grinder's consumption occurring seven years after employment at wet grinding ceased, 116 C 193

a disease caused by progressive effect of continuous employment results, in part at least, in each period of that employment, 116 C 216

—mercurial poisoning resulting from employment over a period of several years, 116 C 216

claim that plaintiff's neuralgia was occupational disease *held* to have no support in facts found, 116 C 301

pneumoconiosis is an "injury" which arises and becomes compensable when the diseased condition yields to the infection and unfits the employee for work, 117 C 603

elucidation of statutory definition of occupational disease, 118 C 40

—must be natural incident of particular occupation, 118 C 40

—must attach to that occupation a hazard which distinguishes it from usual run of occupations and is in excess of that attending employment in general, 118 C 40

"first manifestation of symptom of occupational disease," 118 C 666

conclusion that claimant was suffering from pulmonary tuberculosis not caused by employment and that there was no pneumoconiosis, reached on conflicting medical testimony, sustained, 118 C 672

on conflicting medical testimony, conclusion that overexertion was contributing cause of thrombosis causing death upheld, 119 C 44

whatever predisposing physical condition may exist, if employment is immediate occasion of injury it arises out of it because it develops within it, 119 C 44

—though condition making thrombosis possible takes long time to develop, the thrombosis is matter of minutes, 119 C 44

—death from this source if caused by overexertion is accidental injury, 119 C 44

upon conflicting medical testimony, *held* commissioner justified in deciding that plaintiff was not suffering from lead poisoning, 119 C 248

infectious arthritis as compensable disease, 119 C 522

commissioner's conclusion that plaintiff had pneumoconiosis in 1924, and that earning capacity partially destroyed then, sustained, and rights and obligations fixed by law then in force, 120 C 456

where there was conflict of medical opinion as to whether plaintiff's silicosis was substantial factor in causing disability, commissioner's conclusion should not be disturbed, 120 C 606

conclusion of commissioner that plaintiff's hemiplegia was caused by mercurial poison-

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ing, rather than a congenital aneurysm, reached on conflicting medical evidence, sustained, 121 C 541

to constitute occupational disease, disease must be natural incident of particular kind of employment; one which is likely to result because of inherent nature of employment, 121 C 664

—does not include disease which results from peculiar conditions surrounding employment of claimant in kind of work which would not from its nature be more likely to cause it than other kinds of employment, 121 C 664

decisions leading up to and following amendment of 1927 defining "occupational disease" reviewed, 121 C 664

—to award compensation for plaintiff's tuberculosis, which was caused by unsanitary conditions of her particular employment, and was not necessarily or usually contracted in that occupation (dressmaking), would be contrary to intent of 1927 act, 121 C 664

pneumoconiosis resulting from wet grinding is occupational disease, 121 C 668

—but pneumonia resulting from exposure incurred in highway construction is not, 121 C 668

commissioner warranted in according decisive weight to expert's answer to hypothetical question and concluding on conflicting evidence that claimant's employment was not substantial factor in causing silicosis, 121 C 708

finding of no causal connection between incident on highway and injury to plaintiff's heart, which manifested itself shortly thereafter, sustained on conflicting medical testimony, 123 C 328

maniac psychosis developing as a result of injuries, 124 C 6

finding that there was no causal connection between coronary occlusion and work employee was doing sustained, 127 C 718

fumes volatilized from melting antimony, and hot type, caused dermatitis; resulting incapacity arose out of and in course of employment, 128 C 499

definition of occupational disease, 128 C 499

conclusion of commissioner that coronary thrombosis was not caused by unusual exertion during employment sustained on medical testimony, 129 C 669

§ 15. —Injury or Disease Due to Weakened Resistance

disease resulting from weakened resistance caused by occupation; grinder's consumption, 102 C 6

under act of 1919 diseases, occupational or not, are included, 103 C 93

—weakened physical condition not in itself compensable disease but may become such if it produces condition resulting in incapacity, 103 C 93, 104 C 710

—influenza arising out of conditions of employment resulting in pneumonia, 103 C 93

where peculiar nature of employment causes weakened resistance resulting in contagious, communicable or mental disease, latter is compensable, 103 C 701

sand buffer inhaled small particles of sand, resulting in weakened resistance to infection and finally in tuberculosis; *held* proximate cause established and injury compensable, 104 C 724

amendment of 1927 limits compensation to accidental injuries or occupational disease, 109 C 378

—excludes injury causally traceable through weakened resistance or lowered vitality, 109 C 378

weakened resistance not in itself compensable injury, 110 C 248

—but if injury results from employment because of peculiar susceptibility it is compensable, 110 C 248

—where susceptibility to recurrence of illness necessitates taking position at less wage difference is recoverable, 110 C 248

—recovery where susceptibility results in further incapacity in course of employment by another person, 110 C 253

—as to recovery from him, 110 C 253

where pneumonia could result only from weakened resistance due to exposure no recovery permitted, 111 C 188

—would not be occupational disease, 111 C 192

—effect of 1927 amendments to act and previous pneumonia cases discussed, 111 C 188

impaired resistance and vitality incurred by reason of employment or exposure or other incidents does not, of itself, constitute compensable injury under 1927 act, 116 C 186

—but where such impairment, consequent on definite original injury, intervenes between injury and final result, award is not precluded if latter is traceable back to injury "by way of" the impairment, 116 C 186, 121 C 484

decendent sustained knee injury resulting in long incapacity and two operations, and later died of pulmonary tuberculosis; *held* claim of plaintiff that weakened resistance caused by injury was proximate cause of tuberculosis should have been considered, 116 C 186

§ 16. —Hernia

finding *held* insufficient to show that hernia caused by strain of lifting weights, or that

employee showed usual symptoms, 106 C 211

hernia amendment; meaning of requirement that disability "immediately" follow the accident; one week too long, 108 C 309

—intent to include both traumatic hernia and "herniae of effort," but to exclude from latter cases where there was long interval between accident and disability with resulting uncertainties of proof, 108 C 310

extent to which hernia is compensable a question of policy for General Assembly and not for courts, 108 C 310

—plain language of statute could not be disregarded to provide more liberal rule of compensation, 108 C 310

hernia, where plaintiff was disabled to carry on customary occupation but could continue to do different kind of work at same wages, 119 C 556

—purpose of special requirements in hernia cases was to assure that hernia really resulted from injury or strain in course of employment, 119 C 556

—the "inability to work" requirement of amendment means inability to carry on customary employment, 119 C 556

where disability from psychosis resulted from appendectomy and operations on left and right hernia and latter only was injured in employment, conclusion that repair of right hernia caused psychosis erroneous, 122 C 592

purpose of requirement of proof of hernia resulting from injury "accompanied by evidence of pain," 123 C 43

—where employee felt "snap" but no pain, finding that this was "equivalent to feeling pain when related to hernia," unwarranted, 123 C 43

history of special provisions regarding hernia referred to, 123 C 45

meaning implicit in language employed in statute cannot be extended by interpretation to provide more liberal rule of compensation in hernia cases, 123 C 49

requirement that hernia must result from "accidental injury" accompanied by pain means accident that is unlooked-for mishap or untoward event or condition not expected occurring in conditions of employment, 128 C 608

such untoward event or condition may consist of unexpected conditions arising in course of employment which subject employee to sudden and unexpected strain resulting in hernia, 128 C 608

—where plaintiff loaded bag of potatoes on truck in course of duties from which hernia developed, it could not be said as matter of law that hernia resulted from "accidental injury," 128 C 609

hernia statute does not require that there be instantaneous display of pain; permits reasonable interval to elapse, 128 C 609

—where plaintiff had burning sensation in abdomen as he was walking back from truck on which he had heaved sack of potatoes he gave "evidences of pain," but whether these "accompanied" injury was for commissioner to determine, 128 C 609

§ 17. —Wilful and Serious Misconduct

employee not barred by delay in calling physician for injury apparently slight; especially where no wilful or negligent disregard of the injury, and injury not aggravated by the delay, 92 C 1

failure to heed a warning signal *held* not to constitute serious and wilful misconduct, 93 C 57

employee's refusal to accept or failure to provide medical treatment as wilful or serious misconduct justifying denial of any compensation, 93 C 92

employee is not guilty of wilful misconduct if he does what other employees do without objection although against rules, 93 C 581

"wilful and serious misconduct" which will defeat a recovery includes what, 97 C 47

—existence is question of fact; how determined, 97 C 47

—burden to prove is on employer, 97 C 47

—violation of rule or of instructions not necessarily so, 97 C 47

—continuance in employment which involved going into high places against advice of physician because of liability to vertigo, 97 C 47

mere negligence or heedlessness is not "wilful and serious misconduct," 97 C 47

driving automobile at thirty to forty miles per hour will not alone constitute wilful and serious misconduct, 98 C 544

—burden to prove such conduct is on employer, 98 C 544

conclusion of commissioner de employee's "wilful and serious misconduct," 98 C 591

—if drawn from subordinate detailed facts is reviewable on appeal, 98 C 591

—intentional violation of safety rule is "wilful," but may not be "serious" misconduct, 98 C 591

—facts *held* not to constitute "serious" misconduct by employee, 98 C 591

—wilful and serious misconduct defined, 98 C 591

burden on employer to prove wilful and serious misconduct, 106 C 253

is wrong or improper conduct of grave and aggravated character, this to be determined from its nature and not from its consequences, 124 C 410

—other elements involved, 124 C 410

§ 17 Workmen's Compensation

—plaintiff, who fell to bottom of elevator shaft due to defect in mechanism which permitted door to open when elevator not there, not guilty of, though told by superior not to use elevator, 124 C 415

§ 18. Amount and Period of Compensation

§ 19. —In General

finding *held* not sufficient to show whether dependent was entitled to compensation for a period reasonably required to cure hernia, 90 C 255

award ordinarily includes all injuries sustained, but it may be better in some cases not to include injury whose extent cannot then be satisfactorily determined, 94 C 619

when statutory compensation first awarded is exclusive of anything additional there can be no "further compensation," 95 C 295

period of employment under contract in force at time of injury governs in considering whether actual or customary wages are basis of compensation, 95 C 607

in computing award for proportionate loss, fractional part of number of weeks fixed by statute cannot be used; weekly sum must be multiplied by given number of weeks, 104 C 569

unpaid portion of accrued award for incapacity survives to employee's estate, 105 C 398

vested right to compensation for incapacity survives to employee's estate, though no award made before death, 105 C 398

statute de survival of rights of action and causes of action applies to workmen's compensation, 105 C 400

where because of injury employee not able to find employment he could perform, award for total incapacity proper, 110 C 282

—inability to secure employment as evidence of such incapacity, 110 C 282

—duty of employee to use due diligence and not to decline work he can do, 110 C 282

offer by employer of injured employee of employment within powers and capacity terminates period of total incapacity and ends or limits liability for compensation, 110 C 287

total incapacity; that claimant was discharged as incapable of work is strong evidence of; duty of claimant to seek work elsewhere, 112 C 434

question of claimant's ability to work is one of fact, 113 C 532

—commissioner's finding is conclusive unless not reasonably supported by evidence or conclusion was not reasonable and logical, 113 C 532

where it did not appear whether pneumococcal pneumonia existed before act making it compen-

sable was passed but occupation producing it was carried on both before and after that time, burden on employer to show that it did arise before act took effect, 114 C 29

—in absence of evidence establishing this, full compensation proper, 114 C 25

employers intervened between physical injury and incapacity, 116 C 193

if plaintiff had ceased grinding because of incapacity to do that work but was able to do some other less lucrative work he would be entitled to compensation for partial incapacity, 116 C 196

where plaintiff made no effort to find work, though injury was healed, and his capacity could not be determined except by returning to old employment, finding of 20 per cent impairment based on medical testimony justified, 116 C 708

where after an injury employee earns as much as physical condition will permit, difference between this and what he earned before is fair basis on which to measure compensation, 116 C 709

actual amount employee earns after accident not always fair measure of earning capacity, 116 C 709

—this may be affected by malingering, other sickness or injury, economic conditions, etc., 116 C 709

commissioner may determine actual earning ability as best he can from evidence, particularly as to physical condition and its effect on earning powers, 116 C 709

compensation is based upon incapacity, total or partial, and hence is based on loss of earning power, 117 C 606

before plaintiff entitled to award based on loss of wages, it must appear that by reason of injury he had been, or was, incapable of earning as high wages as before, 119 C 556

—and where agreed facts failed to show basis for doing this, case remanded to commissioner, 119 C 556

for lessened earning capacity, finding that workman unable to earn anything must be supplemented by finding that the inability is due to injury, 125 C 140

—while inability to obtain work is evidential it is not so conclusive as to require finding of incapacity, 125 C 140

plaintiff's susceptibility to dermatitis unfitted him for re-employment in hatting industry and he couldn't get work elsewhere; evidence as to extent of the incapacity from the susceptibility was necessary to justify award, 125 C 141

—where no actual earnings after injury available, evidence of qualified witnesses as to effect of actual physical condition upon earning power appropriate, 125 C 144

words "able to earn" used in statute as to one not employed after injury, are equivalent of earning capacity, 125 C 142

destruction or impairment of earning capacity to be compensable must be due to conditions resulting from specific injury and not to other reasons, 125 C 143

where claimant is totally incapacitated and is also entitled to specific indemnity for loss or loss of use of member, statute limits award for total incapacity to period between date of injury and date on which maximum recovery attained, though total incapacity continues longer, 125 C 563

supplemental award may be made at any time during whole compensation period, 127 C 297

interpretation of statutes de award of specific compensation in lieu of weekly compensation, 129 C 597

—where permanent partial loss of function follows total or partial incapacity and stage of maximum improvement has been reached, commissioner must exercise discretion whether to award specific compensation or continue weekly compensation; *Stapf v. Savin* (125 C 563) overruled, 129 C 600

§ 20. —Average Weekly Earnings

"average weekly wage" in an employment of a net period of less than two weeks is equivalent to the average weekly wage prevailing in same employment in the same locality at the time of the injury, 95 C 607

"net period of two calendar weeks" means two full weeks of six days each, 95 C 607

—does not apply where employment is from time to time for one day alone, on separate contracts, 95 C 607

if in twenty-six weeks period employee worked equivalent of two full weeks, though never full time in any week, average weekly wage, not wage prevalent in community, controls, 98 C 815

normal basis of compensation is employee's "average weekly wage," 98 C 815

—applies if net employment equals or exceeds two full weeks' work, 98 C 815

—prevailing wage applies only to exceptional cases, 98 C 815

wages, how determined when not fixed by contract of employment, 102 C 234

—reasonable value proved by customary price plus evidence of its payment by respondent for same services, 102 C 234

the measure of the earning power of an employee relates to his earnings at the time loss occurs through incapacity to work, 114 C 25

—hence where tuberculosis did not produce incapacity until some years after employment from which it came had ceased, earnings

for the period prior to incapacity were taken, 114 C 25

conditions under which allowances made for board and lodging to an employee in addition to wages should be considered as earnings, 114 C 410

—purpose of weekly compensation for partial incapacity is to make employee good to extent of half earnings of which he was deprived and basis of award is impairment of earning power, 114 C 412

—wages do not always represent actual earnings, as where waiter receives tips, 114 C 412

case of *Rousu v. Collins Company* (114 C 24), holding that earning power of employee relates to earnings at time loss occurs through incapacity to work, reaffirmed, 116 C 193

—and applied to case where change of employers intervened between physical injury and incapacity, 116 C 193

plaintiff contracted pneumoconiosis while working for C between 1913 and 1924, and thereafter worked elsewhere until 1930 when he became incapacitated as result of this disease; *held* basis of compensation was earnings received from employer when incapacity occurred in 1930, 116 C 193

average weekly wages are determined upon basis of actual earnings, 121 C 149

no such break in plaintiff's employment as to limit determination of average weekly earnings to three-week period between last re-employment and injury, 121 C 149

where employee not working under definite contract but from day to day, there can be no discharge in sense of termination of employment, 121 C 152

—employment on any day merely gives rise to right to compensation for services actually performed, 121 C 152

computation where employment previous to injury is less than two calendar weeks; basis is not average earnings for same or similar work; "employment" involves not work alone, but its known and recognized incidents, 126 C 266

—relief worker engaged in snow removal was doing same work as regular city employee, but employment not the same; compensation based on wages prevailing for relief workers, 126 C 266

evidence did not establish prevailing wage of \$25 a week for kind of work plaintiff was doing in same locality at time of injury, 129 C 234

if it is usual incident of employment of carpenters who are paid daily wage that they would lose time due to weather conditions, commissioner may consider that fact in determining weekly wage, 129 C 595

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§ 21. —Particular Injuries; Specific Indemnity

employee can recover for a lacerated finger that prevents his working for a time, and again for its later amputation, 93 C 13

employer must furnish artificial leg if necessary, 93 C 20

if one injured in leg and shoulder, recovery may be had for each, but award for shoulder takes effect upon expiration of incapacity due to loss of leg, as our act does not contemplate double compensation, 93 C 21

specific indemnity for loss of finger is exclusive of further compensation for incapacity following its loss, 93 C 26, 95 C 295

compensation for loss of leg includes loss of earning power during convalescence and damage incidental thereto, 94 C 619

injury distinguishable from those immediately resulting from amputation, as phlebitis in other leg, is not covered by award for loss of leg and the original award can be modified, 94 C 619

if loss of leg results in total incapacity, the award should be for total incapacity and not for loss of leg only, 94 C 619

that leg suffering injury is weak from old injury is of no significance; new injury *held* to be proximate cause, 94 C 619

one-eyed employee who loses other eye is entitled to compensation for total incapacity, 95 C 350

where injury is expected to improve under treatment, employee is entitled to compensation for partial or complete incapacity, 96 C 35

—when it appears that there is no reasonable expectation of improvement, he becomes entitled to specific indemnity provided for injury, 96 C 35

where after injury to finger which results in award as for total loss a partial incapacity results, caused by condition which was not a normal and immediate incident of loss, further award may be made, 99 C 545

—painful condition due to piece of bone remaining after original operation, irritating tissue as it grew over it when hand was moved, 99 C 545

compensation for loss of eye equivalent to liquidated damages; incapacity immaterial, 100 C 417

award for loss of eye does not terminate with death; nor do payments under voluntary agreement, 100 C 417

for partial loss of vision in one eye; amount how determined, 104 C 569

discretion of commissioner in making award proportionate to total loss of member or loss of use, relates only to injuries defined

by statute as causing total incapacity, 104 C 569

pre-existing impairment of one eye is immaterial in determining compensation for injury to the other, 104 C 569

fact that payments were being made under voluntary agreement does not affect rights on death of employee, 105 C 297

unmatured award of specific compensation for loss of eye survives to dependents and not to estate of deceased employee, 105 C 297

where injury to one eye left it 20-30 normal vision, but destroyed binocular vision, case not within statute as to injury to both eyes, 106 C 401

—or that as to loss of vision in one eye or its reduction to one-tenth or less, 106 C 401

—but within provision as to permanent partial loss of function of member, 106 C 401

only expert medical testimony can afford basis for finding as to extent of total loss of function of eye, 106 C 401

—value of remaining vision in injured eye if other were lost to be considered, 106 C 401

since amendment of 1927, one-eyed man who loses other eye is not entitled to specific indemnity for loss of both eyes, 112 C 627

—if totally incapacitated, he may recover for that until maximum improvement in injured eye is reached, 112 C 627

specific indemnity award for resulting handicap through life by reason of loss of use of members of body, distinguished from award for incapacity based upon loss of earning power, 112 C 629

conclusion that plaintiff's injured ribs should not have caused inability to work upheld, 113 C 532

nature of award for partial loss of function of member, 113 C 707

—expression "in lieu of other compensation" in statute does not preclude award for total incapacity, 113 C 707

—but award for total incapacity is limited to time when condition becomes static, 113 C 707

—where claimant has received award for total incapacity for five hundred and eighteen weeks, *held* too late to have specific award in absence of finding when condition became static, 113 C 707

§ 22. —Aggravation of Pre-existing Disease; Apportionment

acceleration or aggravation of pre-existing ailment may be personal injury under the act, 90 C 539

provision as to aggravation of pre-existing disease, construed, 97 C 548

—where pre-existing nonoccupational disease was "lighted up" by injury and partly

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responsible for incapacity, compensation for whole incapacity allowed, 97 C 548
compensation to dependents of employee dying after award is not apportionable, though original award apportioned on ground of pre-existing disease, 103 C 701

statute de apportionment of compensation applies only where there is actual pre-existing disease, not merely a tendency, 103 C 720

where evidence justified conclusion that fall lighted up syphilitic condition and caused paresis, *held* injury compensable, 104 C 362

acceleration or aggravation of pre-existing disease may be compensable injury; but, under statute, compensation must be apportioned, 104 C 709

pre-existing tuberculosis, accelerated and aggravated by employment, not compensable when same amount of work in any other occupation would have produced same result, 104 C 709

statute requires apportionment of compensation in case of pre-existing disease, but this does not apply to awards to dependents, 104 C 720

prima facie employee entitled to full compensation, 107 C 63

—burden on employer to show he was only responsible for aggravation of pre-existing disease, 107 C 63

—mere proof that there was prior disease not enough but evidence must afford reasonable basis for apportionment beyond mere speculation, 107 C 63

—prior disease intended by statute is one arising outside employment, 107 C 63

—law does not apply where it originated in employment, employee ceased work to better condition, and on his return, it was aggravated to cause disability, 107 C 63

—tuberculosis from wet grinding, 107 C 63

provision for apportionment of compensation in cases of aggravation of pre-existing disease not intended to include an injury or disease "which was contracted, developed and aggravated by one industry or business under employment by the same employer, in one continuous employment or in successive employments," 107 C 67, 114 C 25

apportionment on account of pre-existing disease not ordinarily practicable in death case, 114 C 389

where there is accidental injury definitely located as to time and place, existence of constitutional conditions or latent tendency predisposing employee to injury does not defeat recovery; no apportionment required, 114 C 389

decendent with diseased heart died of heart strain from driving hard steering truck; *held* apportionment not required, 114 C 389

burden is on defendant to establish facts requisite to apportionment, 114 C 392, 119 C 44, 121 C 71

—expectation of life; relative effect of injury; prior physical condition, 119 C 44

apportionment, 121 C 71

—statute applies whether immediate cause of incapacity or death is pre-existing disease aggravated by injury, or is the injury where incapacity is increased or death accelerated by the disease, 121 C 71

—where decendent is afflicted by disease which would ultimately be fatal but by reason of injuries death occurred earlier than it otherwise would, there should be apportionment, 121 C 71

constitutional condition or latent predisposition to injury does not require apportionment unless disease does in fact increase incapacity or accelerate death, 121 C 76

statute providing that, in case of accidental injury, disability or death due to acceleration or aggravation of venereal disease shall not be compensable does not prevent compensation in all cases, 122 C 354

—compensation does not depend on condition of health of employee, 122 C 354

—if injury causes disability, it is compensable though such an injury might not have caused the disability if occurring to an average employee, 122 C 354

—so where commissioner found that claimant's injury affected optic nerve in such manner as to result in blindness, that he had syphilis, *nil sig.*, 122 C 361

§ 23. —Deductions and Offsets

employee in concurrence with employer thought injury too trivial to require attention; *held* not negligence in disregarding wound, 93 C 1

refusal to accept or provide medical care suspends employee's right to compensation, 93 C 90

compensation to dependent of deceased not subject to any set-off, counterclaim or recoupment for amounts previously paid during incapacity, 93 C 155

advance payment to employees when compensation is in question can be considered on final payment; also advance payment to dependents; but each is a separate and distinct class, 93 C 155

reduction of award for prejudice to employer for failure to give notice of injury, 100 C 533

employer has burden of proof as to matters which lessen compensation, 103 C 720

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whether employee entitled to compensation during period when he refuses surgical treatment, 108 C 31

§ 24. Commutation of Payments

commutation permitted only where compensation is determinable as to amount and duration, 96 C 672

—not in case of partial incapacity where it depends on difference between earnings before accident and what could be earned after, 96 C 672

—not where award could not be made for fixed number of weeks, 96 C 674

commutation into lump sum allowable only when duration of incapacity is fixed, 98 C 233

—effect of finding that it will continue for definite time and may for longer, 98 C 233

—power to commute weekly payments into monthly and quarterly, 98 C 233

effect of provision permitting commutation into lump sum, 105 C 304

authority of commissioner to commute into lump sum, 108 C 640

—must be within limits of statute, 108 C 640

—these necessitate definite number of weeks' incapacity, either fixed by law or by finding of total incapacity, 108 C 640

—this may arise where award was stated to continue during incapacity, not longer than statutory period, but commissioner also found incapacity to be permanent, 108 C 640

—whether commuted sum can be paid over at once or compensation must be paid in weekly instalments sum being held in control of commissioner, *quaere*, 108 C 640

if commissioner finds that incapacity, total or partial, will continue in same degree for fixed period, he may commute the award when "just or necessary," 120 C 541

—conclusions subject to review and are to be weighed in light of subordinate facts, 120 C 541

—statute interpreted to apply only where commutation is reasonably necessary for welfare of claimant and dependents and at same time is just to all interested parties, 120 C 541

—direct payment can only be justified where convincing evidence that fund will be conserved and applied in accord with intent of statute, 120 C 541

—commutation of compensation of Negro of low mentality *held* erroneous, 120 C 541

—especially as there was possibility of recovery, 120 C 541

award when commuted into lump sum and made presently payable thereupon becomes final judgment, 126 C 491

—as such it is enforceable in ordinary action on judgment, 126 C 491

—issuance of execution "upon any uncontested or final award" authorized in statute is not exclusive method; the award "may be enforced in same manner as a judgment of superior court," 126 C 491

where after award of lump sum was agreed on, claimant was informed by employer that he would receive a special allowance in view of his inability to work further, *held* that sums thereafter received were on account of this allowance, leaving compensation still due, 126 C 491

where action is brought on commuted award, interest properly allowed from date of award, 126 C 497

§ 25. Medical and Hospital Expenses; Nursing; Funeral Expenses

where commissioner allowed an assistant surgeon \$50 though he stated that \$25 would be reasonable, *held* employer is not liable for additional sum, 90 C 256

"surgical aid" not limited to personal service of surgeon but includes all the means and instrumentalities used in surgery which will help effect a cure, 93 C 24

award should include reasonable medical and surgical expenditures by employee before notice to employer, 97 C 548

—with proportionate reduction if failure to give notice has prejudiced employer, 97 C 548

whether licensed osteopath is a "physician" must be determined by circumstances of each case, 101 C 169

—finding that he was competent to treat strained back upheld, 101 C 169

a competent osteopath is a physician whose fees are within statute, 101 C 169

employer charged by statute with payment of all fees and expenses for necessary surgical and medical aid of injured employee, 103 C 434

—when husband or wife may recover for services as nurse, 103 C 434

medical, surgical or hospital services defined; includes all curative measures, but not later treatment for mere comfort, such as alcohol rubs, 104 C 393

commissioner without jurisdiction to make award for expenses not causally traceable to original injury, 111 C 401

commissioner has jurisdiction to award expenses accruing before or after compensation period if traceable to injury, 111 C 401

right of claimant to procure medical services where employer does not furnish them, 113 C 754

—what facts must be found to support award for service of doctor designated by commissioner, 113 C 754

purpose of statute directing medical and surgical charges be same as if made to persons of same standard of living as employee, is to prevent higher charges because employer or insurer is to pay, 117 C 282

—does not make basis ability of employee to pay or that of others obligated or disposed, 117 C 282

—determination in discretion of commissioner which is final unless abused, 117 C 282

statute establishes no limit of time within which means shall be taken to cure or alleviate effects of injury, 119 C 562

—employee may so neglect or delay taking remedial measures as to impair or destroy his right to medical, surgical or hospital service, 119 C 562

§ 26. Procedure before Commissioner

§ 27. —In General; Jurisdiction

commissioner is an executive officer engaged in administrative duties, 89 C 143

“trial” under Compensation Act does not necessarily involve a hearing on the facts, 89 C 144

commissioner can use any information he receives however he obtains it; all steps constitute one proceeding and hearing, 93 C 289

commissioner may decline to accept compromise and order hearing, 93 C 289

not bound by formal rules of evidence, 93 C 295

informality of procedure, 94 C 9

commissioner, if disqualified, can designate another, 94 C 619

plaintiff in compensation proceedings is not required by any rules or procedure to make a formal and complete statement of his claim, 95 C 356

jurisdiction of each commissioner is limited to injuries occurring in his district, 99 C 236

—agreement, waiver or conduct cannot permit him to deal with others except as provided by law, 99 C 236

—if called into another district because resident commissioner is disqualified or incapacitated his finding and award should so state, 99 C 236

intention of act is to vest commissioner with power to determine all questions arising during compensation period, 100 C 417

—thus question whether employer's obligation to make certain payments survived employee's death, 100 C 417

after employee's death, proceedings to be conducted in name of executor or administrator, not in name of estate, 105 C 545

procedure before commissioners should be simple and informal; technical pleadings not required, 106 C 1

facts established by plaintiff in his own behalf should not be unduly narrowed or minimized, 107 C 370

powers of commissioners purely statutory, 108 C 31

ten-day notice applies to hearing on merits, not to one upon motion for extension of time to claim compensation, 109 C 469

length of notice on motion for extension of time is in discretion of commissioner, 109 C 469

finding that due notice was given of hearing on claim is conclusive, where not attacked, 109 C 472

—though notice to extend time to make claim ran against husband and wife, where award was against husband alone, court assumed claim was made against him alone, 109 C 472

decision of commissioner, unappealed from, finally determines right to compensation unless opened and modified under statute, 109 C 599

—award is creation of statute, 109 C 599

—not a judgment, 109 C 601

—if on reopening award finding claimant to be no longer suffering from compensable injury, claim is dismissed and award confirmed, commissioner then has no jurisdiction to proceed to further hearing of claim, 109 C 599

commissioner has no jurisdiction to determine relative liabilities as between subcontractor and contractor as to right of latter to recover payments made, 110 C 225

discretion of commissioner to permit participation by insurers in proceedings without admission or incurrence of liability, 114 C 24

rights of contribution between several insurers or apportionment of liability as regards insured not matters for consideration in compensation proceedings, 116 C 227

commissioner proceeds to hearing without pleadings and without regard to ordinary rules of evidence, 116 C 297

hearing of new evidence by commissioner upon remand for further proceedings, 118 C 29

where commissioner acting for another is himself disqualified, he should designate some other commissioner, 118 C 29

expression of serious doubt as to probative value of evidence made before it was offered, not absolute disqualification, 118 C 37

commissioner should be scrupulous to refrain from hearing matters which he cannot approach in utter fairness, 118 C 39

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—should avoid appearance of prejudice; should withdraw if he feels he cannot be wholly unprejudiced, 118 C 39

if commissioner considers himself disqualified, he may designate another commissioner to hear matter, 129 C 591

question as to statement of which witness he will accept is for commissioner, 129 C 671

§ 28. —Finding and Award

See also §§ 33, 34, *infra*

award of commissioner should give all facts and questions of law similar to a regular finding, 89 C 143

commissioner's finding states facts found, not evidence; also claims of law made and rulings on evidence excepted to, 90 C 539, 91 C 226, 94 C 260, 97 C 76

finding to conform to requirements of rules and practice prevailing in Superior Court, 90 C 540

finding that evidence is true does not establish the fact, 91 C 226

commissioner can determine whether compensation should be made under voluntary agreement or by his direct order, 93 C 289

finding should contain only ultimate facts and conclusions with rulings and claims of parties and the award, 94 C 618

commissioner's belief or opinion has no place in finding, 94 C 619

finding stated there was no evidence that employee had reason to use elevator; *held* that this meant no oral or written evidence, 95 C 40

—did not mean reasonable inferences from facts and circumstances in evidence, 95 C 40

commissioner's relation to voluntary agreement; opening same and approving it, 95 C 356

finding should determine every material issue of fact explicitly, and recite documentary evidence when necessary, 96 C 352

—but should not repeat testimony of witnesses, 96 C 353

—should state only ultimate facts and commissioner's conclusion, not the testimony, 96 C 555, 97 C 76

commissioner may attach memorandum of decision to finding, 100 C 383

should resemble finding made by trial court upon appeal, 103 C 101, 106 C 250

should not contain memorandum of opinion, 103 C 101, 426

should set forth all subordinate facts, 103 C 426

finding made on award to employee conclusive upon subsequent claim made by his dependents after his death, 103 C 701, 105 C 415

—may be incorporated by reference in second finding, 105 C 415

voluntary agreement on same basis as award, 105 C 297

finding must show that death was caused by the injury, 105 C 394

claims of two employees injured in same accident may be joined; but separate awards must be made, 105 C 695

in determining whether award should be against employer or insurer or both, main consideration is interest of employee, 105 C 737

—award against both is ordinarily the better method; effect of such award, 105 C 737

—if insurer is disputing its liability under its policy, award against it alone is abuse of discretion, 105 C 737

commissioner has no jurisdiction to determine which of two insurers liable for payments made by employer, 105 C 737

intent or purpose usually found as primary fact, not as conclusion; must be supported either by direct testimony or as reasonable inference, 107 C 640

award against principal contractor and subcontractor should be made jointly; both primarily liable, 109 C 39

whether commissioner may adjust liabilities of principal and subcontractor, as between themselves, *quaere*, 109 C 39

award for total incapacity within jurisdiction of commissioner though rescript in former appeal remanded case to make award for partial incapacity, 110 C 282

award should state material facts, conclusions of commissioner, and claims of law made to him, with rulings on them, 110 C 283

—not statements of evidence or argumentative comments, 110 C 284

provision extending jurisdiction of commissioner throughout compensation period applies only to revision of awards, 111 C 401

—unless expenses are traceable to injury, commissioner is without jurisdiction, 111 C 401

—but if they are, commissioner may make award, whether they accrued during or after the compensation period, 111 C 401

how far award is final, 112 C 370

—being subject to modification and not an absolute money judgment, it does not conclusively fix amount due, 112 C 370

—it becomes final only at conclusion of compensation period or when definite sum is fixed as due, 112 C 370

—period for execution runs from that time, 112 C 370

—hence where award is for weekly payments execution may be taken out at any time until sixty days after compensation period, 112 C 370

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voluntary agreement between employer and employee after accident to be reported to commissioner, 112 C 580
resembles more nearly an interlocutory than a final judgment, 113 C 178
should ordinarily be made against insured and insurer, 113 C 520
should conform to findings of fact in appeal from Superior Court; terminology of statute should be followed, 113 C 752
pneumoconiosis contracted between 1917 and 1922 but no finding of exact date; compensation *held* properly awarded under amendment of 1919; award should have been based on earnings in 1930 when incapacity occurred, 114 C 24
any and all insurers carrying risk over entire period of employment which brought about incapacity from mercurial poisoning liable, 116 C 216
—award should be against all of them for entire amount, 116 C 216
determination of award for medical and surgical services in discretion of commissioner; final if not abused, 117 C 282
finding should contain all subordinate facts pertinent to inquiry and conclusions of commissioner therefrom, 117 C 603
—if not, neither Superior Court nor Supreme Court can decide whether or not award was correct, 117 C 603
—conclusions of commissioner must be tested by subordinate facts in finding alone, 117 C 603
—if some of these facts are legally inconsistent with conclusion reached, there is reversible error at law, 117 C 603
duty of commissioner to find subordinate facts upon which his conclusions are based when he has reason to believe there will be appeal, 118 C 312
—particularly where motion to correct finding is made, 118 C 312
evidential matter has no place in the finding, 118 C 675, 123 C 188
undisputed facts should be added to finding by commissioner, 122 C 357

§ 29. —Reopening; Modification

§ 29(1). In General; Procedure

commissioner can open or modify an award as specified by statute; power is not like that of a court, 94 C 618, 95 C 295
request for modification follows form adopted in making original application; order of notice should specify statutory cause justifying the modification, 94 C 618
little similitude between compensation award and judgment at law; nor between proceedings to modify former and for a new trial in the latter, 94 C 619

modified award can fix gross sum for entire injury and deduct payments made under former award, 94 C 619
no appeal being seasonably taken from original award, it cannot be directly challenged or set aside, 95 C 295
—its terms can be considered in a supplemental hearing for additional amount to determine whether existing conditions call for modification, 95 C 295
award is not open directly to review three years after it was made, 95 C 297
awards open to revision until completely performed; resemble interlocutory decrees rather than final judgments, 95 C 356, 105 C 301
power of commissioner to reopen an award generally, 97 C 76, 100 C 190, 103 C 701
having opened the award, commissioner may try case de novo, 97 C 76
award has none of elements of finality of judgment, 97 C 332
—power to modify awards is not limited to those made directly to injured employees, 97 C 332
commissioner can only reopen award on application of some one legally entitled to relief, 101 C 110
no appeal lies from denial of motion for rehearing or recomittal, 101 C 356
period of ten days for appeal dates from final disposition after reopening, 103 C 431
power of commissioner to reopen and modify award governed by statute, 103 C 701
—where award made to injured party and he dies no occasion to open first award where dependent makes a claim, 103 C 701
only limitation on reopening award is that it must be for "any proper action," 105 C 301
—opening where employee dies while compensation is being made, 105 C 301
—voluntary agreement of compensation, 105 C 305
in passing on claim of dependent for death, commissioner cannot reopen award to workman for incapacity made before death, 105 C 415
power of commissioner to reopen matter after informal finding and take further testimony, 105 C 545
when motion to reopen award is to be granted, 106 C 4
right to reopen award to be construed in view of liberal spirit of act, 107 C 164
—too strict adherence to legal niceties not proper, as where applicant has not been diligent, 107 C 164
appeal does not lie from denial of modification sought upon a ground not within statute, 108 C 159

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decision of commissioner unappealed from final, unless award opened and modified in accordance with statute, 109 C 599

award can be opened only on grounds specified in statute which are radically different from those for granting new trial, 109 C 599

—after reopening for newly discovered evidence, hearing and affirmation of award, commissioner had no further jurisdiction except upon another application to reopen, 109 C 599

—if award in question was that claimant no longer suffering from compensable injury, after affirming it, commissioner could not proceed to rehearing of claim that he was so suffering, 109 C 600

provision of act that commissioner shall retain jurisdiction during compensation period applicable to revision of awards, 111 C 401

—does not limit jurisdiction in original award, 111 C 401

discretion of commissioner in exercising power to modify award is a legal discretion, 112 C 333

commissioner has jurisdiction over award during whole compensable period; an appeal does not deprive him of jurisdiction to reopen it, 113 C 170

if commissioner's ruling on motion to reopen involves only exercise of discretion, it is reviewable only if discretion is unreasonably exercised; if error of law, the court upon appeal must review it, 113 C 170, 262

—as where commissioner denied motion on ground that certain statute was unconstitutional, 113 C 262

action of commissioner in refusing to hear motion to reopen on ground that he had no jurisdiction by reason of appeal taken *held* reviewable, 113 C 170

motion to reopen is similar to motion for a new trial in a court case; is virtually a new proceeding, 113 C 177

jurisdiction of commissioner continues during entire period which award might cover, 113 C 747

under statute commissioner retains power to open awards during entire compensation period for "any proper action" under preceding provisions of this section only, 116 C 1

—and cannot do so upon other grounds than those prescribed therein, 116 C 1

within discretion of commissioner, 121 C 640
commissioner had no power to open award so that it ran against real employer over objection of plaintiff, who desired to sue real employer at common law, where defendants always had knowledge of true facts, 128 C 1

where plaintiff made motion for hearing of new testimony de weekly wage, action of

commissioner, on own initiative, terminating weekly payments and awarding specific compensation, over objection that plaintiff not prepared to meet issue, was breach of due process of law, 129 C 591

§ 29(2). Change in Incapacity, Dependence or Conditions of Fact

original award should include all injuries, but if extent of prognosis is doubtful, it may be left for future determination, 94 C 619

it is proper to modify award to meet changing conditions, 95 C 295

—but terms of original award are to be regarded, 95 C 295

where award was made of an improper sum for "further compensation," the equivalent of that allowable under the changed condition, *held* nothing further should be allowed, 95 C 295

employer entitled to have award reduced where measure of dependency has decreased, 97 C 332

modification of award for increase or decrease of incapacity or dependence; commissioner has discretionary power to make retroactive order, 108 C 31

commissioner's refusal to modify award on ground of changed conditions of fact *held* not justified by evidence and exceeded his legal discretion, 112 C 333

jurisdiction of commissioner continues during entire period which award might cover, 113 C 747

—award ordering compensation to cease because claimant is able to work, may be opened and further award made, 113 C 747

—motion and award liberally considered to show changed condition, 113 C 747

—where nothing indicated when changed condition arose, award recommitted, 113 C 747

—improper to relate it back to time of order for ceasing payments, 113 C 747

changed condition of fact justifying termination of payments; finding insufficient to determine questions, 114 C 395

power to reopen not necessarily dependent upon finding that conditions causing incapacity have so altered that incapacity has changed or ceased, 116 C 229

—sufficient if inability to work is not attributable as proximate result of injury, 116 C 229

finding that nervous condition at time of hearing was not proximate result of injury but was due solely to pendency of litigation and uncertainty as to compensation constitutes changed condition of fact justifying modification, 116 C 229

if nervous disorder resulting from injury is followed by another nervous disorder having no relation to it, though incapacity ac-

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companies both, commissioner may terminate compensation, 116 C 229

though symptoms of arthritis not discoverable until after original hearing, and finding was that arthritis in fact existed at all times subsequent to injury, *held* error to reopen award on ground of changed conditions of fact, 119 C 522

after employee's, death widow moved to reopen award based on voluntary agreement, award reciting it was "fair settlement of disputed claim"; *held* no changed condition of fact, as disease from which employee was suffering was same at all times, 120 C 280

§ 29(3). Other Grounds

revisionary power by commissioner over original award is the same as that of court of equity over its decrees; may reopen because of mistake of fact, 95 C 350, 113 C 179

power to reopen where insurer claims that employee and her physician made fraudulent misstatements on original hearing, 97 C 77

when allowance for medical expenses was refused as matter of law, commissioner could modify award to include them in light of subsequent ruling of Supreme Court, 98 C 738

failure to notify employer of injury, does not bar recovery of medical expenses, 98 C 739

—commissioner may reopen award and include such expenses, 98 C 739

—award subject to revision during entire compensable period, like judgments of courts during term at which rendered, 98 C 739

not proper to set aside award where insurer has consented to agreement and later claims mistake as to injured party being in employment of respondent when it knew or could have known facts, 100 C 180

—in such case principles which would control court of equity in acting on judgment control, 100 C 180

—insurer by assenting to agreement and later modifications estopped to make present claim, 100 C 180

—commissioner can act in any case only within limitation that he may set aside award "for any proper action," 100 C 180

application to open award for new evidence governed generally by rules for new trial on similar ground, 106 C 1

—except for necessity of due diligence on first hearing and denial for inadvertent mistake of fact, 106 C 1

—when to be granted, 106 C 1

—motion need not contain statement of former testimony unless long time has elapsed or different commissioner is hearing matter, 106 C 1

—on appeal substance of original new evidence must appear, 106 C 1

—if commissioner summarily dismisses motion proper to return case for hearing on its merits, 106 C 1

if court of equity could reopen judgment commissioner can open award "for any proper action," 106 C 90

—power includes fraud, accident or mistake of fact resulting in something not intended and causing injustice, 106 C 90

—award for injury to one eye made in ignorance of fact that employee's sight in other eye was completely gone, 106 C 90

mere assurance by claimant that he will produce new evidence not sufficient; actual production should be required, 113 C 282

—strict requirement of exercise of due diligence not made, as in ordinary civil case, 113 C 282

where evidence was not "hitherto available," and other evidence was to correct erroneous recollection of commissioner as to interview with witness, rehearing *held* properly granted, 113 C 282

that evidence offered is cumulative would not of necessity destroy its sufficiency as ground for rehearing, 113 C 285

reopening for mistake of law being beyond power of court of equity over its judgments is not "proper action" for commissioner, whose powers are subject to like restriction, 116 C 1

—where Supreme Court in another case established different basis for computing compensation than that used by commissioner, he could not open an award to make it accord with decision, 116 C 1

award of compensation for pneumoconiosis on basis of period preceding cessation of work *held* improperly opened and modified to basis of period preceding disability, mistake being one of law, 116 C 1

if original symptoms at first attributable to injury continue, but later developments or investigation show they were not caused by injury, situation involves mistake of fact and commissioner may revise award, 116 C 229

when commissioner finds facts establishing that award was made under mistake or misapprehension of material fact, he may and should reopen and modify it, 116 C 229

whether commissioner may modify award as mere "therapeutic measure" calculated to end nervous affection, *quære*, 116 C 235

commissioner has same power to open award as would any court to open judgment, 119 C 170

—action rests in discretion, not to be overturned unless discretion abused, 119 C 170

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- for newly discovered evidence, evidence must not have been discoverable before trial by use of due diligence, 119 C 170
- must not be merely cumulative, and must be sufficient to probably change result, 119 C 170
- at hearing on claim for loss of vision for detached retina, plaintiff gave no history of definite strain to which it could be attributed; on motion to open award he testified to stars shooting out of eye while lifting bags; *held*
- not newly discovered evidence as it was in plaintiff's possession at time of original hearing, 119 C 170
- and not sufficient to change result standing alone, experts not having testified as to reasonable probability of causal connection, 119 C 170
- plaintiff's claims that symptoms, not discoverable at first hearing, subsequently developed would be basis for reopening for newly discovered evidence, 119 C 522
- review of cases bearing upon principles which should guide commissioner in exercise of discretion on motion to open award on ground of newly discovered evidence, 119 C 522
- where issue fairly litigated, with proof offered by both parties, claimant not entitled to rehearing to introduce cumulative evidence unless it would be likely to change result, 119 C 522
- but mere inadvertence or negligence, without intentional withholding of evidence would not necessarily debar him of rights, 119 C 522
- matter is one which must lie largely in discretion of commissioner, 119 C 522
- where finding merely stated that at onset of arthritis diagnosis is difficult but made no statement bearing on whether it was discoverable at time of original hearing *held* commissioner not justified in opening award, 119 C 522
- but as proceeding did not develop vital issues as to whether plaintiff was entitled to have award opened for newly discovered evidence, court should have remanded it to commissioner for determination of rights in light of true situation, 119 C 522
- if claimant has failed for some reason to establish his right to compensation, if it appears reasonable that on further proceedings he may be able to do so, case may be properly remanded for such proceedings, 119 C 522
- after employee's death widow moved to reopen award based on voluntary agreement, award reciting it was "fair settlement of disputed claim"; *held* no mistake of fact, as finding that there was definite difference of medical opinion as to cause of claimant's disability could not be corrected, 120 C 280
- though autopsy showed employee died of sarcoma and widow claimed there was virtual accord of medical opinion at time of award that he had Paget's disease, 120 C 280
- widow had no claim as such, since she released all future claims in any capacity in voluntary agreement, 120 C 280
- where insurer signed compensation agreement based on average weekly wage of \$45 as result of fraud in which claimant participated, commissioner correctly opened award and reduced compensation, 121 C 149
- refusal to reopen justified when new evidence was at all times in possession of president of defendant company, who presented its case without counsel, and even if it had been presented would not have affected decision, 121 C 640
- fact that evidence claimed as basis of motion to open is not newly discovered and might have been offered in exercise of due diligence does not, in itself, prevent granting of motion, 126 C 265
- question for commissioner is whether it appears likely that injustice has been done and that upon rehearing different result would be reached, 126 C 265
- dissenting opinion as to this, 126 C 285
- award by stipulation in which parties agreed that payment should be in full and final settlement was subject to modification for mistake though it constituted a release in full, 128 C 574
- so where agreement recited injury to wrist and later plaintiff found she had also sustained injury to head, award was modified, 128 C 574
- refusal of commissioner to reopen award after plaintiff returned to work and then claimed partial incapacity, sustained, 128 C 621
- motion to open finding and award on ground of newly discovered evidence treated as motion for new trial rather than one to reopen award on ground of changed condition of fact, 128 C 626
- evidence in support of it not considered alone but in relation to that offered when original motion to reopen for changed condition of fact was heard, 128 C 626
- while in ordinary case unless evidence at original hearing is before court it cannot act, where same commissioner who made original award hears motion it is not necessary to set out evidence on original hearing, 128 C 627
- where claimed new evidence was that of doctor which was contrary to that of doctors who testified at original hearing, motion denied, 128 C 627

where plaintiff in effect moved for hearing to consider new testimony de average weekly wage, ruling that original finding and award was res adjudicata in absence of appeal, erroneous, 129 C 591

—upon such motion, question is whether upon rehearing it appears likely a different result would be reached, 129 C 591

denial of motion for change of doctors sustained where finding was that claimant required no further treatment, 129 C 591

§ 30. —Evidence; Burden of Proof

claimant has burden to prove that injury arose out of employment, 93 C 49

commissioner can resort to scientific authorities and dicta; judicial notice, 94 C 10

burden is on claimant to establish statutory essentials of his case, 95 C 40

burden to prove "wilful and serious misconduct" on the part of an employee is on the employer, 97 C 47

declarations of deceased employee are proper evidence before commissioner, 98 C 646

—expert testimony making it more probable than otherwise justifies finding that injury was due to employment, 98 C 650

commissioner may discourage extended examination as to medical details, 100 C 383

—but should be careful not to limit rights of parties to fully present case in orderly way, 100 C 383

burden of proof is on claimant but is sustained as regards number of employees unless facts show less than five are employed, 102 C 3

burden of proof is on claimant to establish essential facts, 103 C 720

—but as to those which bar or diminish recovery, burden is on respondent, 103 C 720, 114 C 29

—such as wilful misconduct or pre-existence of disease reducing compensation, 103 C 720

—as to employment of less than five, legal presumption helps out claimant, 103 C 720

—where commissioner could not determine whether or not disease causing incapacity had existed before act permitting recovery for disease became effective, full recovery allowed, 103 C 724

when evidence so strong as to induce reasonable belief of existence of fact, it should be found, 104 C 362

burden of proof upon plaintiff to establish how his injury occurred, 104 C 535

—compensation not allowed where workman started to work and was last seen walking rapidly and appearing unnatural and body later found in river, 104 C 535

value of medical expert testimony in general; when it is sufficient basis for finding that

injury proximately caused by employment, 104 C 714

claimant has burden to prove that he is an employee, 105 C 545

cause of disease such as tuberculosis can rarely be conclusively proved, 105 C 651

—function of commissioner to weigh opposing opinions of experts and accept more credible and weighty, 105 C 651

commissioner cannot arbitrarily disregard trust worthy and undisputed medical testimony, 106 C 211

commissioner may consider as evidence the conclusions of factory foreman who investigated cause of accident, 106 C 250

commissioner cannot accept part of plaintiff's medical theory and reject balance, unless such rejection is reasonable under the evidence, 107 C 73

duty of commissioner to hear evidence upon all issues, 107 C 454

—thus error to dismiss claim on ground that employee engaged in interstate commerce, without hearing evidence as to dependency, and that injury arose in course of and out of employment, 107 C 454

—particularly as case might go to United States Supreme Court for review where these facts necessary to present issue of interstate commerce, 107 C 454

—evidence as to injury arising out of and in course of employment essential to determination of that issue, 107 C 454

testimony of employer anxious to aid employee against insurance company to be closely scrutinized, 107 C 645

claimant has burden to prove it to have been at least a reasonable probability that injury arose out of employment; testimony that it was reasonably possible, not sufficient, 112 C 692

certification of evidence; importance of conforming to correct procedure, 114 C 146

burden on respondents to establish facts requisite to apportionment because of pre-existing injury, 114 C 392

act would not justify award based solely on incompetent evidence nor justify commissioner in refusing to hear evidence in support of essential elements of claim, 116 C 297

burden rests on plaintiff to show incapacity results from occupational disease as defined, 118 C 29

—fact that there were no known cases of lead poisoning among casters in other factories of defendant relevant and material, 118 C 29

—but where object of this evidence not stated by defendant, no error in excluding it, 118 C 29

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evidence of lead content in air in brass foundry has bearing on lead poisoning being an occupational disease, 118 C 37

necessity of expert testimony of reasonable probability of causal connection between occupation and injury, rather than mere possibility, 119 C 174

great latitude allowed commissioner in admission of evidence, 122 C 353

—within province of commissioner to accept statement in medical book which doctor read after stating he could not answer question from personal experience, 122 C 353

when question as to causal relation between operation and psychosis is topic requiring special experience of expert, 122 C 596

where there was sufficient testimony to support finding of scar tissue shortly after accident, conclusion of no causal connection between accident and loss of eye a year later should not have been disturbed, 123 C 405

§ 31. Appeal from Commissioner

§ 32. —In General

appeal to Superior Court is an original application to determine whether award is reasonable or within powers of commissioners; not a retrial of the facts, 89 C 143

on appeal, facts are not retried by court; inquiry into them can be made to determine illegality, irregularity, reasonableness, or whether commissioner misconceived his powers, 89 C 367

Superior Court should dismiss appeal if it agrees with the commissioner, or should sustain award in part and ask commissioner to correct errors, or should sustain appeal and remand the cause to commissioner to be reheard, 90 C 444

on appeal to Superior Court, case not tried de novo; decided on commissioner's finding unless it is challenged and found incorrect, 92 C 87

questions raised on reservation from Superior Court *held* the same as those on appeal from commissioner, 92 C 87

—latter claimed error in rulings "upon the evidence"; former omitted this phrase, 92 C 87

what justifies setting award aside, 93 C 83, 94 C 9, 96 C 299

mere allegation that evidence is insufficient to warrant finding is of no value as a reason of appeal, 93 C 91

—this merely a request to retry case, 93 C 91

where commissioner's memorandum showed use of certain evidence, *held* court could review propriety of that use, 93 C 292

nature of appeal, 94 C 9

pro forma award by commissioner reserved for opinion of Supreme Court, 94 C 262, 95 C 609

reservation; only questions of substantive rights should be reserved, 95 C 160

—not questions as to propriety of correcting commissioner's findings, 95 C 160

—wholly academic questions will not be considered, 95 C 161

if appeal not taken in time, award cannot later be set aside, but its terms can be considered, 95 C 295

where trial court sustains commissioner, Supreme Court will only find error where it is apparent and its effect upon the decision very material, 96 C 300

court not limited to question commissioner deemed to be single point of law involved, 98 C 591

—must determine whether award is sound on facts found, 98 C 591

an award is final and enforceable unless appeal is taken as prescribed by statute, 101 C 356

there is no appeal from refusal of commissioner to rehear the case or alter his finding, 101 C 358

where by inadvertence or otherwise finding is incomplete, proper course for Supreme Court is to return case for award on further finding, 102 C 238

reservation of question of law after trial court has determined motion to correct finding proper when, 102 C 511

order of trial court directing commissioner to file evidence how far reviewable, 102 C 702

—if it refuses to make order application may lie to Supreme Court, 102 C 702

duty of counsel as to transcript of evidence on appeal to Supreme Court, 103 C 702

proper if motion contains allegations requiring proof, 104 C 351

—as where it relates to manner in which appeal is taken, 104 C 351

—as where not taken in time allowed, 104 C 351

—plea in abatement is proper procedure, 104 C 351

where two insurers were disputing liability and commissioner made award in part against each when one only legally liable, on appeal of other as to award against it whole case was remanded, 105 C 741

where on motion commissioner summarily dismisses petition to open award for newly discovered evidence, case to be returned for hearing on merits, 106 C 2

reopening judgment setting aside award to plaintiff, 107 C 164

—power should be used in view of liberal policy of act, 107 C 164

—decision on brief excerpts from testimony reopened where employer pleads financial

inability before hearing to procure all testimony, later filed, 107 C 164

claim not made before commissioner cannot be raised on appeal, 108 C 31

none lies from failure to reopen award for a reason not within those designated by statute, 108 C 159

—if Superior Court finds error in award and it can be changed or modified, the court should sustain appeal and direct commissioner to correct award, 108 C 159

—in such case, appeal lies from this judgment of Superior Court, not from award as finally made by commissioner, 108 C 159

expense of printing testimony not taxable against claimant appealing to Supreme Court under statute, 109 C 737

court assumed evidence certified was all evidence bearing on issue, 112 C 336

if commissioner's ruling on motion to reopen involves error of law, the court upon appeal must review it; if only exercise of discretion, it is reviewable only if discretion is unreasonably exercised, 113 C 170

action of commissioner in refusing to hear motion to reopen on ground that he had no jurisdiction by reason of appeal taken *held* reviewable, 113 C 170

appeals from rulings on motion to reopen award; when discretionary and when matter of right, 113 C 262

denial of motion to reopen on ground that law under which award was made was unconstitutional *held* appealable, 113 C 262

finding as to facts on which commissioner reopened award should be made by him, not by acting commissioner on rehearing, 113 C 284

where commissioner did not definitely pass upon claim presented by appeal, case sent back for further consideration and hearing if necessary, 116 C 186

effect of pro forma award; function of Superior Court on; function of appeal in, 116 C 216

it is seldom, if ever, that a ruling on evidence can be made the subject of appeal, 116 C 297

—but the award may not be based solely on incompetent evidence nor can commissioner refuse to hear evidence in support of essential elements of claim, 116 C 297

commissioner not required to make finding setting forth his rulings upon evidence for purpose of appeal, 116 C 297

—trial court *held* to have properly disregarded claimed errors in rulings on evidence set forth in plaintiff's "draft finding," 116 C 297

even though claimant has failed to establish right to compensation, if it appears reasonable he may do so, court may remand case

for further proceedings, 118 C 29, 119 C 522, 121 C 127

—and where finding has been so corrected as to destroy basis of award, whether final decision should be rendered or further proceedings had is in discretion of court, 118 C 29

—remand for further proceedings *held* justified in lead poisoning case, 118 C 29

no power in Superior Court to determine what commissioner shall hear cause on a remand, 118 C 29

—and where commissioner who was disqualified appointed acting commissioner, latter took jurisdiction until final judgment, 118 C 29

—but if latter, by reason of occurrence at first hearing, feels himself disqualified he should withdraw, 118 C 29

—as if he feels that he is not open to persuasion as to probative value of certain evidence, 118 C 39

though commissioner erred in ground upon which compensation was denied, court should dismiss appeal if employee not entitled to recover on some other ground, 119 C 561

rules in compensation appeals interpreted in same way as similar rules concerning appeals in other cases, 120 C 463

evidence by defendant of expectancy of life of decedent, due to disease, and motion for insertion of finding of expectancy, sufficient to raise issue of apportionment on appeal, 121 C 71

though claimant has failed to establish right to compensation, if it appears reasonable that on further proceedings he may do so, case may properly be remanded, 121 C 127

—same as to defendant, when there has been mistake, inadvertence or misunderstanding, 121 C 127

—so case remanded where defendant made admissions decisive against and failed to offer proof in favor of his claim that plaintiff was independent contractor, 121 C 127

plaintiff should be given opportunity to develop further facts on rehearing where it reasonably appears he may be able to, 122 C 599

commissioner not an officer of Superior Court, as are referees or committees to which it refers cases, and practice as to recommitting reports not applicable to compensation appeals, 123 C 107

motion to erase appeal, on ground that no evidence was presented, properly denied where there were issues of law which could be considered in absence of evidence, 125 C 25

decision of Superior Court on appeal becomes final when not appealed from as to question decided by it, (dis.) 126 C 285

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where commissioner opened award but did not pass on merits of claim, and on appeal Superior Court sustained that ruling and remanded case for commissioner to pass on motion to correct award and to complete record by including evidence, there was no final judgment permitting appeal, 126 C 522
Superior Court cannot retry facts, 127 C 528

judgment remanding case to commissioner to hear further evidence, correct finding and enter award was not final one from which appeal would lie, 128 C 284

where court set aside award of \$25 a week, it should have remanded case to commissioner with direction to modify award, and not left plaintiff, who is entitled to compensation, without any, 129 C 234

§ 33. —Correction and Review of Commissioner's Finding

§ 33(1). In General; Power of Superior Court

commissioner's finding, unless corrected by Superior Court, is made part of the record without any other finding; corrections should be indicated, 90 C 444

power of Superior Court to correct finding is similar to that of Supreme Court over finding of trial court, 92 C 87

conclusion of commissioner must stand if reasonably supported by evidence, 93 C 289

reasonable inferences from facts not set aside on appeal, 95 C 40

on appeal, Superior Court determines whether commissioner's finding should be corrected; control stops there, 95 C 40

—it is within the province of the commissioner to determine which of two theories is supported by the evidence, 95 C 44

—if evidence may support either, Superior Court cannot disturb decision, 95 C 44

on appeal, Superior Court can examine evidence certified to by commissioner to see if a motion to correct commissioner's finding should be granted, 95 C 669

—can order all evidence to be certified by commissioner to protect rights of parties not represented, 95 C 669

not error for commissioner to accept opinion of one expert though he is opposed by several, 96 C 295

—but to accept expert opinion based on grounds wholly inadequate or unreasonable may be, 96 C 295

finding of commissioner on conflicting evidence is final, 96 C 633, 97 C 47

—will not be altered unless facts are found without evidence or conclusion is unreasonable, 96 C 633

if court materially alters finding, case must be returned to commissioner for rehearing,

as court cannot determine it upon the merits, 97 C 76

finding may be held erroneous in several particulars, 97 C 77

correction of finding in Superior Court similar to the power of Supreme Court to correct one on appeal, 98 C 286

—statement supported by evidence or inference supported by facts found, not to be stricken out, 98 C 286

—facts not admitted or undisputed may not be added, 98 C 286

—“impression” of commissioner has no proper place in finding, but is harmless, 98 C 287

commissioner is trier of facts whose finding is of same import as that of judge, 99 C 353

—credit of witnesses and weight of testimony is for him, 99 C 353

—finding of subordinate facts is conclusive unless found without evidence or omitted when admitted or undisputed, 99 C 353

—ultimate conclusion may be attacked if some one or more of subordinate facts are inconsistent or, being an inference, violates reason or logic, 99 C 353

—finding may be corrected as regards subordinate facts or attacked in law as regards conclusions of law or ultimate facts, 99 C 353

nature of appeal to Superior Court, 102 C 511

—power of that court to correct finding, 102 C 511

—constitutional limitation on Supreme Court does not apply, 102 C 511

—court does not retry facts but acts only by correcting finding, 102 C 511

failure to state subordinate facts is ground of appeal, 103 C 426

power of Superior Court to correct finding of commissioner and procedure analogous to powers of Supreme Court to correct finding of Superior Court, 104 C 535

finding can only be corrected on grounds permitted by the rules, 105 C 545

where expert medical testimony is conflicting, commissioner's determination is conclusive, 105 C 651

finding not corrected by striking out facts found upon disputed evidence nor by adding facts having no bearing upon result, 105 C 651

where opinion of one medical expert supports commissioner's conclusion, that others oppose it not good ground to disturb award, 106 C 107

—credibility and weight of testimony is for commissioner, 106 C 109

where finding incomplete, case must be returned to commissioner for further hearing, 106 C 211

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if finding is inadequate as tested by finding of court for an appeal and proper proceeding taken, trial court should correct, 106 C 251

where corrections made materially alter finding, to be returned to commissioner for a redetermination, 106 C 254, 107 C 164

if essential medical testimony is uncertain, case must be returned for further proceedings, 106 C 401

facts will not be added to a finding, if they would not change the result, 107 C 143

where on facts award of compensation not sustainable, but further hearing might elicit other facts, case remanded for further hearing, 107 C 640

if Superior Court decides appeal without taking action on requested corrections of finding, an appeal to Supreme Court, based solely on that decision, must be decided on the same facts, 108 C 493

findings not subject to correction unless unreasonable, 109 C 62

—it is province of commissioner to weigh testimony and determine what is most credible, 109 C 62

when finding is so illogical or unreasonable as to justify judicial interference, 111 C 532

where evidence is conflicting amount of disability is for commissioner and court cannot correct it, 112 C 435

question of plaintiff's ability to work is one of fact and commissioner's finding conclusive unless unreasonable, 113 C 532

finding of subordinate facts not corrected unless they are found without evidence or material facts admitted or undisputed are omitted, 113 C 721

—if finding is based on inference, not corrected unless inference is one which reasonable man could not reasonably reach, 113 C 721

where finding fails to state facts sufficient to show basis of commissioner's action with reference to claims of parties, case should be remanded, 114 C 393

finding based upon conflicting medical testimony must stand, 115 C 446, 120 C 543, 121 C 544, 123 C 330, 405

belief of commissioner that subordinate facts stated are sufficient, not sound reason for denying motion to correct, 115 C 446

—commissioner should not refuse to find fact merely because he deems it unnecessary or immaterial, 115 C 446

where Superior Court did not pass on motion to correct finding and corrections affected right to compensation under Supreme Court ruling, case sent back for action on motion, 116 C 186

when doctors disagree, it is duty of commissioner to reconcile their views so far as

possible and adopt view which appears most credible, weighty, and reasonable, 118 C 675

—conclusion will not be disturbed where reasonable, 118 C 675

where medical testimony is conflicting, conclusion of commissioner as to cause of death cannot be successfully attacked, 119 C 51

if facts found by commissioner can fairly and logically be reached, finding cannot be corrected, 119 C 228

conclusions of commissioner on commutation reviewable, 120 C 541

conclusion reached upon comparison and examination of conflicting medical opinion can rarely be found erroneous in law in absence of bad faith, 120 C 606

cause returned to commissioner where facts not sufficiently found to render just judgment, 121 C 274

difference between power of commissioner in correcting his finding and that of Superior Court on appeal, 121 C 279

—duty of commissioner not only to add corrections based on admitted or undisputed facts but also those he thinks party entitled to though evidence is conflicting, 121 C 280

where facts not sufficiently found to render just judgment, judgment should be entered in which appeal is sustained, with directions for further proceedings by commissioner, 123 C 102

Superior Court cannot retry facts; it examines them to determine whether finding and award were unauthorized in law, etc., 125 C 559

plaintiff should be afforded opportunity to correct finding if there is any reasonable prospect of his being able to do so, 129 C 532

§ 33(2). Particular Cases

finding of facts *held* too meager for court to decide that a dependent is entitled to compensation for a period reasonably required to cure hernia, 90 C 255

findings of commissioner as to causal connection between injury and disease causing death are of fact, reviewable when, 96 C 295

—so question of partial dependency, 96 C 295

finding that employee not guilty of "wilful and serious misconduct" sustained, 97 C 47

declarations of deceased employee of his work and its effect upon him admissible, 98 C 646

—finding resting in part on such evidence is legally supported, 98 C 646

where no evidence to explain onset of paresis due primarily to syphilis except a fall in course of employment and there was medical evidence that such a fall might light up

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- that condition, finding of commissioner that it did must stand, 104 C 362
- where award could not be sustained because no sufficient connection shown between injury and act claimed to have caused it but it appeared that further testimony might show connection, case returned for further proceedings, 106 C 211
- where commissioner accepted theory of claimant's medical witness that death was due to heart disease caused by burns admittedly received in course of employment, rather than shock as respondent's witness claimed, but denied causal connection of death with burns, a conclusion unsupported by any medical testimony, conclusion of commissioner could not reasonably stand, 107 C 73
- trial court properly corrected award to include causal connection and remanded case to commissioner for award to claimant, 107 C 73
- when commissioner accepted all of testimony of witness except single statement which was itself consistent with other testimony and reasonable, *held* error not to accept it, 111 C 532
- should have been corrected so as to show facts supporting claim that weakened resistance due to knee injury was proximate cause of tuberculosis, 116 C 186
- correction of finding to effect that disability to work from pneumoconiosis occurred in 1924 instead of 1930 refused, 116 C 193
- finding corrected to enlarge period of employment found to have materially contributed to plaintiff's incapacity from mercurial poisoning, 116 C 216
- where evidence as to whether plaintiff was struck by piece of falling coke was conflicting, finding of commissioner that he was not should not have been corrected, 116 C 301
- where medical testimony was conflicting as to whether conditions of employment aggravated pneumonia from which employee died, conclusion was one of fact for commissioner, 119 C 4
- whether a blow struck decedent was proximate cause of his death by broncho-pneumonia was question of fact for commissioner and appeal dismissed, 119 C 694
- where there was conflict of medical opinion as to whether plaintiff's silicosis was substantial factor causing disability, commissioner's conclusion should not be disturbed, 120 C 606
- whether decedent killed at railroad on way home was on employer's business was disputed fact on which commissioner's decision final, 121 C 56
- court correct in ruling that corrections could not be made where commissioner decided relative effects of injury and disease on conflicting evidence, 121 C 71
- where there was reasonable support in evidence for commissioner's conclusion that condition of decedent's brain resulting from injury did not contribute as substantial factor to his death from appendicitis, it could not be reviewed, 121 C 483
- commissioner warranted in according decisive weight to expert's answer to hypothetical question and concluding on conflicting evidence that claimant's employment was not substantial factor in causing silicosis, 121 C 708
- where there was conflicting medical testimony on question of whether syphilis or injury to left eye caused blindness, finding of commissioner was one of primary fact and case should not have been remanded on theory that it was conclusion, 122 C 353
- conclusions reached by comparison of conflicting professional opinion can rarely be found erroneous, 122 C 353
- province of commissioner to determine matter, not Superior Court, 122 C 353
- loss of vision having been shown as developing progressively until it became total, unnecessary to remand case for finding that claimant made complaint to doctor of loss of vision, 122 C 358
- where question of whether or not disability was due to first or second accident was essentially medical one and there was medical testimony before commissioner, error to remand case to him for further finding, 123 C 188
- finding of no causal connection between incident in highway and injury to plaintiff's heart which manifested itself shortly thereafter, sustained on conflicting medical testimony, 123 C 327
- where there was sufficient testimony to support finding of scar tissue shortly after accident, conclusion of no causal connection between accident and loss of eye a year later should not have been disturbed, 123 C 405
- finding that maniac psychosis developed as result of injury was one of primary fact, 124 C 7
- and was justified upon medical testimony which was sufficient to remove question beyond conjecture or surmise, 124 C 6
- finding that plaintiff who had had back trouble before, was not incapacitated from doing same kind of work he had been, sustained, 124 C 296
- where evidence conflicting but afforded support for findings made and those sought to be added were not admitted or undisputed, denial of motion to correct justified, 124 C 357

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finding that decedent died of heart stroke, involving weighing conflicting expert testimony, was of a primary fact, not a conclusion, and with commissioner's determination court could not interfere, 125 C 380
refusal of commissioner to credit testimony of plaintiff and her witnesses and finding that she did not sustain injury at plant, not so unreasonable as to justify judicial interference, 125 C 559
in view of conflict in medical testimony court could properly conclude that finding of no causal connection between coronary occlusion and work was conclusive, 127 C 718

§ 33(3). Procedure; Certification of Evidence

power of Superior Court to correct finding of commissioner and procedure analogous to powers of Supreme Court to correct finding of Superior Court, 92 C 87, 104 C 535
Superior Court does not retry facts; evidence should not be certified unless to correct commissioner's finding, 93 C 90, 95 C 674

motion to correct finding should be made to commissioner not to the Superior Court, 95 C 669

—the evidence should be certified and made a part of the record, 95 C 669

motion to correct finding must be made within two weeks from filing of appeal unless otherwise fixed by statute or extended by commissioner, 95 C 669

transcript of evidence that is relevant is filed with motion to correct or as soon thereafter as it can be secured, 95 C 669

appellee may file further transcript of additional evidence within one week after appellant has filed his, 95 C 669

motion to correct finding with commissioner's decision thereon must be filed in Superior Court within a reasonable time, 95 C 669

errors assigned should be the finding or refusal to find the facts referred to in the motion to correct, 95 C 669

—Superior Court can examine certified evidence in order to pass on these points, 95 C 669

—cannot try ultimate issue of facts on independent examination of evidence, 95 C 669

Superior Court can require whole or any part of the evidence certified if it is necessary, 95 C 669

if Superior Court refuses to correct finding, appellant may incorporate refusal in assignment of error; Supreme Court determines assignment on evidence certified to Superior Court and made a part of the record, 95 C 669

—appellee can have a correction by the same method, 95 C 669

statements of commissioner in denying motion to correct treated as findings by him, 100 C 347

evidence can be considered only as related to motion to correct finding; court cannot use it to supply omissions in finding, 100 C 347, 104 C 459

evidence should only be certified to Superior Court for corrections or additions subordinate facts or in order to protect rights of parties not represented by counsel, 102 C 511

where party merely files uncertified copy of all evidence with commissioner to secure correction, trial court should not order him to file transcript, 103 C 427

duty of party seeking correction as to furnishing evidence, 103 C 427

evidence should not be printed unless refusal to correct finding made ground of appeal, 104 C 569, 724

appellant should move to strike out findings which he seeks to attack and not merely move to add inconsistent ones, 104 C 722

extension of time to file motion to correct finding does not authorize filing further motions after time has expired, 107 C 56

evidence attached to motion to correct award made to commissioner should be certified by secretary or stenographer, 107 C 248

—if not, motion may be denied, 107 C 248

—but commissioner should order defect remedied; if he fails, Superior Court should direct him to do so, 107 C 248

—court cannot act in absence of evidence, 107 C 248

—whole evidence should be certified only where excerpts will not serve purposes of appeal, 107 C 248

—commissioner should add any evidence not filed by parties which is material, 107 C 248

necessity of following proper practice as to certifying evidence emphasized, 114 C 146

—but where defect waived, court considered printed testimony, 114 C 146

procedure where pro forma award is made and party wants corrections in finding, 116 C 219

—function of appeal to Supreme Court in such a case, 116 C 220

remand to commissioner for further finding and award does not mean they must necessarily be based solely on evidence already heard, 118 C 29

—consideration of evidence already offered without recalling witnesses would be justified, 118 C 29

—but commissioner may properly require rehearing, at least as regards issues not sufficiently presented by original finding, 118 C 29

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—or he may hear evidence supplemental to that offered at original hearing, 118 C 29

—as in present case, commissioner must hear evidence as to tests of air in defendant's factory on issue of lead poisoning, 118 C 36

evidence before commissioner on motion to open award not available for purpose of correcting finding, 119 C 170

commissioner should have incorporated in finding rulings excluding evidence, as requested by appellant, 121 C 133

where corrections involved require consideration of entire evidence or the parts of relevant and material evidence are inextricably involved with the rest, it is proper to attach entire evidence with motion, 121 C 274

—commissioner in error in refusing to pass on motion to correct because entire evidence was attached; appellant might have appealed on that ground, 121 C 279

procedure for correction of finding of commissioner outlined, 121 C 278

—purpose of rules to provide that all the material evidence shall be before court, and to save expense of printing evidence which has no bearing on corrections, 121 C 278

corrections and findings of commissioner should be sought by appellee by assignment of error not by bill of exceptions, 122 C 129

where commissioner has failed to take some step necessary to present issues, motion to Superior Court that he be directed to do so proper, 123 C 102

—ruling of court on such motion not itself basis of appeal but may be assigned as error in appeal taken from final judgment later rendered, 123 C 102

—so proper method to secure order that commissioner act on motion to correct was not to assign his failure to do so as reason of appeal but to make such a motion, 123 C 102

finding of commissioner based, in part at least, directly on evidence may to that extent be reviewed on basis of that evidence, 124 C 436

—being made not merely as deduction from other facts found but upon all evidence in case, it is not to be treated as conclusion reviewable only on basis of subordinate facts, 124 C 436

provision in rules in connection with motion to correct finding that it shall be accompanied by portions of the evidence as party deems relevant and material, construed, 125 C 22

—where party filed all the evidence it was within discretion of Superior Court to or-

der commissioner to act on motion, 125 C 22

§ 34. —Review of Conclusions from Subordinate Facts

if ultimate conclusion of commissioner is wrong, its validity tested by subordinate facts as set forth by him in finding, 93 C 91

findings of commissioner on causal connection between injury and disease and on partial dependency are conclusive unless he applied illegal standard, drew conclusion not justified by subordinate facts, or found fact material to conclusion without evidence or against evidence, 96 C 295

finding of commissioner will not be altered unless conclusion is unreasonable, 96 C 633

finding of commissioner as to wilful and serious misconduct ordinarily final, 98 C 591

—but may be reviewed in light of subordinate facts found, 98 C 591

findings as conclusions of fact drawn from subordinate facts found which must stand unless illogical or inconsistent with facts found, 98 C 755

finding may be attacked in law as regards conclusions of law or ultimate facts, 99 C 353

commissioner's conclusions present questions of law, unless correction of finding requested, 100 C 346

the question whether less than five are employed reviewable; a conclusion from subordinate facts, 102 C 5

—so where court adopted erroneous test, 102 C 5

whether injury arose out of and in course of employment is ultimate conclusion reviewable on basis of subordinate facts found, 102 C 237

if finding of commissioner is really a conclusion from subordinate facts it may be assigned as error of law, 102 C 471

commissioner's conclusions not reviewable in absence of subordinate facts; evidence cannot be used for this purpose, 103 C 426

where subordinate facts not sufficient to support finding, return of case to commissioner for additional finding *held* proper, 104 C 459

refusal to grant allowance of attorney's fee to employer not reviewable where relevant facts not found, 104 C 504

the commissioner's conclusions are open to attack if illogical or unreasonable, 105 C 123, 111 C 367

—but no good purpose served in attacking one which has no definite legal significance, 105 C 123

dependency, and extent of it, are conclusions to be drawn from subordinate facts, 105 C 421

conclusion that injury arose "in course of employment" may be reversed on appeal, though appellant only attacks conclusion that it arose "out of" it, 105 C 516

finding of commissioner that injury arose in course of employment will not support award unless facts found to sustain it, 105 C 516

whether workman was employee or independent contractor presents a reviewable conclusion, 105 C 545

dependency is question of fact; finding conclusive unless unsupported by subordinate facts, 106 C 233

if commissioner's conclusion is based on incorrect legal principles or is contrary to reason or logic, it should be reversed, 107 C 62

—but case cannot be retried upon basis of conclusions appellate court would itself draw, 107 C 63

conclusions of commissioner can be attacked as errors in law where resulting in incorrect application of law or an inference illogically drawn, 113 C 721

finding that plaintiff's neuralgia existed before employment and was not caused by accidental injury connected with it *held* supported by evidence and not inconsistent with subordinate facts, 116 C 297

where finding did not fix date when claimant's rights to compensation for pneumoconiosis first arose, neither Superior Court nor Supreme Court could say that commissioner's conclusion that notice was "seasonably given" was correct, 117 C 603

—decision of this question by Superior Court, upon assumption that injury and incapacity dated from 1924, not warranted, 117 C 603

Superior Court cannot find erroneous in law conclusion drawn from subordinate facts, unless in violation of some rule of law, in conflict with logic and reason, or contrary to or inconsistent with subordinate facts, 122 C 129

where there was conflicting medical testimony on question of whether syphilis or injury to left eye caused blindness, finding of commissioner was one of primary fact and case should not have been remanded on theory that it was conclusion, 122 C 353

finding of commissioner based, in part at least, directly on evidence may to that extent be reviewed on basis of that evidence, 124 C 436

—being made not merely as deduction from other facts found but upon all evidence in case, it is not to be treated as conclusion

reviewable only on basis of subordinate facts, 124 C 436

finding that decedent died of heart stroke, involving weighing conflicting expert testimony, was of a primary fact, not a conclusion, and with commissioner's determination court could not interfere, 125 C 380

finding that partition was "an essential and necessary condition" in operation of business was conclusion of fact; cannot stand unless supported by subordinate facts, 129 C 44

§ 35. —Procedure in Taking Appeal

on appeal there is a record fee, but each party pays his own, 89 C 155

on appeal, reasons of appeal and answer should be filed and tried immediately, 91 C 226

—if no evidence required, written motion for judgment should be placed on short calendar, 91 C 226

finding of the commissioner is part of record of Superior Court; need not be formally made so by the court, 91 C 525

court may bring up evidence, if necessary, by an order in the nature of writ of certiorari, 93 C 93

defects in matter of procedure that do not prejudice rights of parties, of no avail, 94 C 618, 106 C 1

period of ten days for appeal dates from final disposition after award is reopened, 103 C 431

appeal from commissioner is to be taken within ten days after notice of entry of award, 104 C 351

—if not taken in that time is voidable, not void, 104 C 351

—motion to dismiss or erase appeal not proper if motion contains allegations requiring proof, 104 C 351

—as where it relates to manner in which appeal is taken, 104 C 351

—as where not taken in time allowed, 104 C 351

—plea in abatement is proper procedure, 104 C 351

must set forth the grounds or reasons of appeal, 105 C 398

on appeal to Supreme Court, assignment of error that Superior Court erred "in sustaining award" or "in overruling respondent's claim" too general, 105 C 418

on appeal from denial of a motion to open an award for newly discovered evidence substance of original and new evidence must appear, 106 C 2

fact that commissioner's memorandum of decision discusses a question of law not of itself sufficient to present the matter for review on appeal, 109 C 39

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- court will not pass on it when not properly raised by appeal though question was argued by both sides before commissioner and Superior Court and both sought a decision, 109 C 45
- duty upon all concerned in preparation of record, and not least upon counsel, to see that extraneous matter is not made part of it, 118 C 42
- duty of commissioner to find subordinate facts upon which his conclusions are based when he has reason to believe there will be appeal, 118 C 312
- particularly where motion to correct finding is made, 118 C 312
- extension of time to file appeal papers may be granted after time fixed by rules has expired, 120 C 457
- court may act upon motion filed after time fixed by rule and so extend the time by implication, 120 C 457
- effect of order by court to commissioner to do something to perfect appeal merely corrects record of appeal already pending in Supreme Court and does not require him to make another award or appellant to take another appeal to Supreme Court, 125 C 26

§ 36. Recovery from Third Parties

- employee whose injury is due to wrongdoing of third person may settle claim with latter, 92 C 398
- but employer may have amount so paid applied in reduction of his liability for compensation, 92 C 398
- provision for joinder of employer in action of employee against third person in no way alters rights of employee, 99 C 573
- provision for indemnity between employer and third person immaterial, 99 C 573
- legal liability of third party is condition precedent to employer's statutory right to reimbursement, 101 C 200
- payment of compensation does not affect plaintiff's rights in action against third party, 101 C 200
- railroad which has paid negligence claim of one whom as it knew was within act is not bound to reimburse insurer of employer's liability for payments made under act, 101 C 200
- liability to insurer is dependent on determination of its liability to employee and this not effect of voluntary settlement, 101 C 200
- right of insurer to sue under statute permitting employer to intervene in action by employee against third person, quare, 101 C 200
- charge to jury in case where employer of plaintiff has paid him compensation and seeks recovery with him from defendant, 102 C 736

- plaintiff's right of action unaffected by compensation received, 102 C 736
- proper form of judgment where employer and employee secure verdict against third party, 104 C 504
- granting allowance for attorney's fee to employer within reasonable discretion of trial court; includes power to refuse any fee, 104 C 504
- failure to appeal from commissioner not admissible in action against third party; failure to make claim may be, 107 C 568
- rulings of commissioner not admissible in action against third party; different parties involved, 107 C 568
- effect of employer joining as plaintiff in action by employee to recover of third party, 109 C 723
- general contractor entitled to reimbursement for compensation payments to employee of subcontractor, 110 C 221
- action by employee who has received compensation from corporation employing him, against another, which caused injury, 112 C 510
- allegation that former is subsidiary of latter is no defense, 112 C 510
- where a compensation act does not deprive employee of common-law right against third person who has injured him, receipt of compensation does not discharge tortfeasor, 115 C 563
- employee has not received satisfaction by award of compensation, 115 C 563
- same rule applies where State compensated member of National Guard for injuries received in course of his service, 115 C 563
- not intention of our Legislature that wrongdoer should benefit by payments of compensation by employer, 115 C 563
- employer is not joint tortfeasor where injury is caused by negligence of another, 115 C 563
- employer entitled to judgment for compensation he has become obligated to pay employee's dependents, in suit brought by personal representative of employee against third party for wrongful death, 116 C 91
- action is under both § 5231 and § 5987, Rev. 1930, 116 C 91
- and "employee" as used in § 5231 includes his personal representatives if he is dead, 116 C 97
- intent of statute to avoid two independent compensations for the injury, 116 C 98
- plaintiff paid compensation to X, injured on job plaintiff contracted to do for defendant, by negligence of latter's employee; no recovery on ground of indemnity or contribution or in tort, 124 C 227
- where one by his negligence has injured another, he is not relieved from paying any

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part of the compensation because payment thereof has been made by third party, 125 C 293

—rule applicable notwithstanding fact that payment is made by employer to employee who is injured by tort of fellow employee, 125 C 293

—employer not joint tortfeasor with employee, whether his payments are made under or not under Compensation Act, 125 C 293

—and provision of compensation act that injured employee's right of action against third person shall not be affected by payment of compensation, and not excepting situation where fellow employee is tortfeasor, conclusive reason against allowance of credit, 125 C 293

§ 37. Insurance Policies; Rights and Liabilities of Insurers

whether insurer can sue third party, *quære*, 101 C 200

requirements as to insurance policies considered, 105 C 737

—policies construed to cover all payments made necessary by injury suffered during policy period, 105 C 737

policies must cover entire liability of employer; presumption that they do so, 105 C 737

form of policy which seems to comply with statute, 105 C 737

where injury occurred before expiration of policy, insurer *held* liable for all consequences resulting after expiration, 105 C 737

when award should be against both employer and insurer, award against insurer alone *held* abuse of discretion, 105 C 737

commissioner has no jurisdiction to determine which of two insurers liable for payments made by employer, 105 C 737

limitation in policy upon employer's right to recover indemnity from insurer not relevant where award was directly against insurer, 111 C 229

where contract subject to provisions of act, employer to insure liability or file proof of financial ability to meet necessary payments under the act, 112 C 580

purpose of statutory requirement that notice of insurance effected or canceled be filed with commissioners, 113 C 128

—estoppel of insurer to deny truth of record applies whether or not particular employee had examined files, 113 C 128

—filing requires actual delivery to proper officer and mere mailing is not enough, 113 C 128

—where employer refused to accept policy and it was canceled but notice of cancela-

tion not received by commissioner, company *held* liable, 113 C 128

each employee is in a sense a party to insurance policies taken by employer, 113 C 130

by statute employee given right of direct recovery from insurer, terms of policy are given a fixed significance by a conclusive presumption and defenses insurer may make against him are restricted, 113 C 130

policy covering loss for injuries to employees in business operations described in accompanying declaration and all operations necessary, incident or appurtenant thereto construed, 113 C 504

—where declaration stated places of work to be Connecticut and New York, policy did not cover injury suffered in Vermont, 113 C 504

—that work was incident to general business of employer not sufficient, 113 C 516

policy covering full liability for employees employed at certain place is sufficient under the statute, 113 C 504

under policy covering injuries in Vermont, liability determined by its laws and Connecticut award cannot create it, 113 C 504

if policy is ambiguous, to be construed favorably to insured, 113 C 513

—express terms of policy cannot be extended by implication, 113 C 513

—policies in general are to be construed as other written contracts, according to intent of parties, 113 C 513

—are to be construed as a whole, 113 C 513

—particular language must prevail over general, 113 C 514

employer may take out several policies in different companies, each covering his full liability on different portions of his work, 113 C 516

discretion of commissioner to permit participation by insurers in proceedings without admission or incurrence of liability, 114 C 24

—insurer bound by findings of commissioner as to date of injury and the like, 114 C 27

every policy to be so drawn as to cover entire liability; as between employee and insurer policy conclusively presumed to cover entire liability, 116 C 216

—purpose is that employer shall at all times be in position to fulfill obligations to employees, 116 C 216

—statutes do not require single continuous policy, 116 C 216

—requirements met by succession of policies, one taking up risk where other drops it, 116 C 216

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where employee incurs poisoning in policy period of one insurer, symptoms become manifest in that of another, and incapacity results in that of a third, terms of policies determine which one bears burden of compensation, 116 C 216

where language of policies is ambiguous as to which of successive insurers is responsible for compensation, interpretation best protecting employee will be adopted, 116 C 216

policies of successive insurers providing that they should apply only to "injuries so sustained by reason of accidents" occurring in policy period construed to impose liability for any compensable disease arising from employment during period, 116 C 216

—word "accident" taken to mean conditions of employment which produced mercurial poisoning, 116 C 216

—any and all insurers carrying risk over entire period of employment which brought about incapacity liable, 116 C 216

—and each such insurer is liable for entire amount and award should be against all of them, 116 C 216

—rights of contribution not adjudicated, 116 C 227

insurance imposes upon insurer a direct obligation to pay each employee any compensation awarded him within its terms, 116 C 226

rights of contribution between several insurers or apportionment of liability as regards insured not matters for consideration in compensation proceedings, 116 C 227

conclusion of court that there was no mutual mistake in compensation policy, which as written did not cover obligation under compensation laws of both Vermont and Connecticut, which would justify reformation of policy, upheld, 120 C 503

—also conclusion that the partial coverage in the policy was not result of fraudulent representations and negligence of defendant's agents, 120 C 503

workmen's compensation insurance is of a peculiar type and employee is really a party to every policy, 127 C 706

purpose of notice de date when policy is effective and date of expiration; insurer estopped to deny truth of formal record; that error in stating in notice time when cancellation was to become effective was made by employee of insurer, no ground to override requirements of statute, 127 C 708

WRIT OF ERROR

- § 1. IN GENERAL; EFFECT OF
- 2. WHEN IT LIES
- 3. PROCEDURE

See also APPEAL TO THE SUPREME COURT

§ 1. In General; Effect of

defendants who fail to join in are not parties on re-entry on reversal, 1 R 496

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record cannot be contradicted, 5 C 541

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is stricti juris and judgment is reversed, however trivial the error, 9 C 344

doubtful if court can review the evidence on which court below found fraud, 17 C 1

advantage may be taken of writ of error on unauthorized entry to prosecute after death of original plaintiff, 17 C 109

motion in error stands on same footing, 21 C 284

to reverse judgment, the inadmissibility of evidence allowed must appear on record, 21 C 505

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brings up for review the declaration, pleadings and judgment, 26 C 581

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writ of error is ordinarily a supersedeas after final judgment and before execution, 44 C 414

appeal under statute serves all the office of writ of error, 55 C 155

where first writ abates by act of plaintiff in error, a second writ is not a supersedeas of execution, 55 C 155

—unless withdrawn and another substituted for good cause, 55 C 155

writ of error substituted for appeal under statute, assigning same errors as appeal excepting one which lay outside the record; such error held insufficient for withdrawal of appeal and substitution of writ, 55 C 155

writ brought for delay is not a supersedeas of execution, 55 C 156

writ of error is not supersedeas of peremptory mandamus, 59 C 217

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writ of error to justice court is stricti juris; any error will avail, 66 C 441

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writ on questions of law reaches only errors of record, 72 C 611

from City Court to either Superior or Supreme Court; cannot appeal to both from same judgment, 74 C 204

Superior Court has no jurisdiction when only errors of law assigned, 74 C 452

remedy not coextensive with that afforded by appeal, 83 C 690

reversal of judgment on writ of error puts parties in same position as they were before, 85 C 271

where General Assembly has not made special provision for service of writ of error, remedy lies with it and not with Supreme Court, 85 C 374

writ of error is an independent action, 85 C 374

errors assigned in writ of error *held* those of law only, and therefore cognizable by Supreme Court, not by Superior Court, 86 C 229

writ of error in matters of fact is limited to such facts as do not appear of record, which, if true, show that judgment to have been erroneous because party had no legal capacity, or legal opportunity to be heard or court had no power to render judgment, 86 C 229

appeal in liquor cases has effect of writ of error, 86 C 378

if upon the record only one judgment is possible court may on reversal direct that judgment to be entered, 96 C 403

—decree in such a case, 96 C 404

effect of entry of judgment against defendant for want of appearance, 97 C 125

effects a supersedeas and stay of execution during its pendency unless defendant obtains an order to contrary, 116 C 22

—order may be made by judge of Supreme Court if there is no probable cause for allowance of writ, 116 C 22

writ of error brought by defendant where State was plaintiff, 119 C 217

—while State cannot be made defendant without its consent, where it invokes jurisdiction, it subjects itself to any proper cross demand, 119 C 217

—and writ of error, though independent action in procedural sense, is no less an attack on original judgment than an appeal, 119 C 217

—original judgment cannot be pleaded in bar, 119 C 220

—effect of reversal is to destroy original judgment, 119 C 221

—and by bringing original action State waives its immunity as regards writ of error, 119 C 217

ordinarily defendant who suffers judgment by default is precluded from attacking it by appeal or writ of error, 119 C 217

—but not so where defendant is trustee and beneficiary whose interest is at stake was not made defendant, 119 C 217

writ of error not barred because execution was issued and satisfied on original judgment, 119 C 217

—if it is reversed party receiving benefit must make restitution, 119 C 217

—relief may be secured in action itself by scire facias if facts are in dispute or if not by order to show cause, 119 C 223

—when facts are undisputed, Supreme Court may award damages but it is better practice to remand case to lower court for any affirmative relief, 119 C 217

—and inclusion of claim for damages in writ does not invalidate proceeding, 119 C 217

injunction claimed against enforcement of judgment in summary process by justice of peace, writ of error having been withdrawn, on ground justice had improperly denied jury trial, 121 C 702

—this denial might constitute error in attack by writ of error, but would not deprive court of jurisdiction or make judgment void, 121 C 703

—and proceeding by writ of error having been abandoned, judgment cannot be attacked for error in proceedings, by injunction, 121 C 703

§ 2. When It Lies

lies from judgment of two justices in forcible entry and detainer, 1 R 75, 4 C 91

does not lie on interlocutory judgment until final judgment, 1 R 181, 1 D 27

does not lie on a judgment on plea in abatement, 1 R 551

—omission of final judgment in, amendable, 1 R 551

abatable if errors of fact and law be joint, 2 R 525

—but not if errors of fact be immaterial, 2 R 61

does not lie on judgment refusing new trial, 2 D 364

—nor on petition for new trial, refused, 1 C 50

lies only in favor of those prejudiced, 5 C 89, 16 C 442, 39 C 83

lies only on final judgment, 6 C 61, 21 C 283, 24 C 390, 28 C 465, 35 C 222

§ 2 Writ of Error

—same rule applies to motion in error, 24 C 390
does not lie to revise appointment of freeholders to assess damages under private charter, 13 C 118
admission of improper evidence not affecting decree not ground for, 15 C 187
matter stated in motion for new trial will not be revised on writ of error, 15 C 430
lies when, 16 C 44
writ of error can be brought only by party aggrieved by judgment, 16 C 436
lies from improper remanding of case by Superior to County Court, 18 C 221
lies for misjoinder of counts in trespass and case, 19 C 127
does not lie from judgment on cross-bill during pendency of original bill, 21 C 284
cannot be brought on interlocutory judgment, 24 C 387
not a proper mode to review mistakes in admitting or rejecting evidence, 26 C 581
—nor errors in charge to jury, 26 C 581
lies by plaintiff to reverse a judgment void on its face, 28 C 444
lies to reverse judgment void for want of jurisdiction, 31 C 214
does not lie on judgment rendered on motion to dismiss, 35 C 222
does not lie to remedy a decree vague and ambiguous, 36 C 210
to revise proceedings in equity, a writ, not a motion in error is the proper course, 39 C 63
—motion for new trial is not adapted for such purpose, 39 C 63
lies from judgment of peremptory mandamus, 44 C 390
—but is no supersedeas of same, 44 C 414
lies upon an adjudication of contempt of court, 44 C 393
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—motion in error is the sole remedy by statute, 46 C 466
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where city charter is silent de writs of error, none lie under statute, 48 C 300
lies only upon judgment and from Superior Court, 69 C 601
only method of procuring revision of erroneous proceedings in summary process, 79 C 306
—writ of error directly to Supreme Court in summary process when, 79 C 306
lies to review decrees in equity as well as law, 83 C 690
rulings and decisions not in record or involved in judgment are not reviewed even if assigned as erroneous in writ of error, 83 C 690

contempt of court not reviewable by writ of error, 84 C 60
writ of error is common-law method of taking case to higher court on question of law, 85 C 618
—lies only when error of law appears on face of record, 85 C 618
—under common law if rulings on evidence or charge were desired, they could be brought into the record by bill of exceptions, 85 C 618
questions of law arising from ruling on evidence or charge were raised by motion for new trial, from 1806 to 1882, 85 C 618
—since 1882 by statutory appeal, 85 C 618
plaintiff as well as defendant has right of writ of error in summary process, 86 C 32
whether defendant can have writ of error in summary process within three years, quare, 86 C 32
writ of error is common-law remedy; an independent action to review, after final judgment, error apparent on the face of the record, 87 C 608
facts not apparent on the record must be taken advantage of by appeal, 87 C 608
if judge dies so that no finding can be made, remedy is motion for a new trial, 87 C 608
—but writ of error may be had to review errors that appear on judgment record, 87 C 608
—with respect to such errors the two remedies, by appeal and by writ of error, co-exist, 87 C 608
plea in abatement to writ of error assumes that writ was brought to correct errors apparent on record, 87 C 608
writs of error are confined to the courts specified; not used to review decisions of a “judge” on legality of vote on the liquor question, 88 C 141
where acts say judge’s decision is “conclusive,” it means final; no writ of error lies, 88 C 141
lies from final judgment only, 88 C 142
a writ of error can raise questions: (1) arising from interlocutory rulings on pleadings, (2) relating to jurisdiction, and (3) designed to show whether adjudication was within the issues raised and determined, 88 C 142
summary process is reviewable only by writ of error, 92 C 144, 95 C 69
on writ of error failure of trial court to find a certain fact cannot be reviewed, 94 C 452
correctness of summary process judgment can be challenged only upon a writ of error, 96 C 626
writ of error as remedy for correction of judgment file, 108 C 93

writ of error to Supreme Court limited; may not take place of appeal, 108 C 143

writ of error is not proper remedy for review of rulings of trial court or charge to jury, 108 C 143

writ lies from judgment purporting to affect rights of one not a party to action where record does not show he was properly cited in, 109 C 27

writ to Supreme Court does not lie to present errors which might have been presented upon an appeal which was taken from judgment, 114 C 730

writ of error to Supreme Court lies only from final judgment and for errors of law apparent on record, 116 C 24

judgment depending on matters outside record cannot be reviewed by writ of error, 116 C 700

—as where in petition for new trial on ground of misleading one of issues was whether this was due to inadvertence and mistake, 116 C 700

where record of justice of the peace did not show accused was a minor, failure to appoint guardian ad litem not open to attack on writ of error, 116 C 722

right of State to take appeal or bring writ of error in criminal case, 118 C 373

—in absence of constitutional or statutory provisions, is denied in most American jurisdictions, 118 C 373

—but must be treated as question of first impression here, 118 C 373

—reasons usually advanced: right denied by English common law, procedure never invoked in particular jurisdiction, double jeopardy; reasons dismissed in present case, 118 C 373

—right to appeal here restricted to cases in Superior Court and Courts of Common Pleas, and then only when court grants permission, 118 C 373

—and so where statute under which accused was prosecuted is held unconstitutional in City Court, writ of error is only means for review, 118 C 373

—nor does it subject accused to double jeopardy, since entire proceedings constitute but one putting of accused in jeopardy, 118 C 373

—limited character of questions open on writ of error—claimed errors apparent on face of record—meet danger of remedy being improperly invoked, 118 C 373

—and provision that writ be served and returned “as other civil process” did not effect any essential change in scope of writs of error, 118 C 384

—writ of error from judgment of City Court holding statute under which accused was prosecuted unconstitutional *held* properly brought, 118 C 373

writ presents only claimed errors on face of record; in instant case substantial question presented by writ was presented upon record of case annexed to it, 119 C 217

remedy not coextensive with process of appeal, 119 C 416

—not to be used when more adequate and equitable process of appeal can be used, 119 C 416

—only errors which appear on record of Superior Court can be considered, 119 C 416

—memorandum of decision improperly contained in writ, 119 C 420

—but insurance policy filed on order of court in pursuance of demand for oyer becomes part of pleadings and is part of record, 119 C 416

where summary process actions are tried upon the facts in courts whose decisions are reviewable only in Supreme Court, they must be presented to it by writ of error, 125 C 543

—but where such writ has been taken from municipal courts of justices of peace to Superior Court or Court of Common Pleas and there decided, an appeal lies to Supreme Court from the judgment, 125 C 543

§ 3. Procedure

two judgments may properly be joined in one writ of error, when, K 162

on reversal plaintiff must re-enter case at same term, 1 R 85

must be brought in county where judgment is rendered, 1 R 259

coplaintiff unwilling to prosecute allowed to disappear, 1 R 280, 2 D 491

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whether bond of third person is “a bond with surety,” *quaere*, 41 C 190

—bond by plaintiff only is insufficient, 41 C 190

under statute, cannot be brought to Supreme Court except in that county or district in which the case was decided, 59 C 496

recognizance *held* a “bond” under statute, 75 C 650

§ 3 Writ of Error

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in absence of finding of facts or bill of exceptions, various assignments of error *held* not properly presented, 83 C 690
abated unless served thirty days before sitting of Supreme Court in the same manner as civil process, 85 C 374
bill of exceptions in writ of error abolished in Connecticut in 1806, 85 C 618
must be taken to next term of the court, 85 C 618
neither party can allege facts contrary to the record, 86 C 229
memorandum is not a finding; not part of the official record unless made so by the court, 87 C 608, 88 C 141
on writ of error it cannot be determined what inference trial court drew, what facts were found, or conclusions of law drawn, 87 C 608
transcript of the evidence has no place in writ of error; facts must appear in judgment file or in a finding, 88 C 141
errors must be specifically assigned, 91 C 671
certification of evidence upon writ of error is superfluous, but harmless, if error of law is properly presented by bill of exceptions, 94 C 452
bill of exceptions must furnish appellate court with all information necessary to determine matters submitted, 94 C 452
party asking a bill of exceptions is responsible in some measure for its preparation and Supreme Court will not help him on obscure and uncertain statements, 94 C 452
a general allegation of error is sufficient where a question is brought to Common Pleas Court from justice of the peace by a writ of error and then appealed to Su-

preme Court, as the specific errors already appear in the writ of error, 95 C 281
in summary process a writ of error is allowed after forty-eight hours although execution is not stayed beyond that time, 95 C 281
function of bill of exceptions is to place all material facts on record, and it is presumed to do so, 96 C 403
even in summary process, writ of error may be brought at any time within three years, 97 C 123
—unless brought within forty-eight hours, will not stay execution, 97 C 123
rulings on evidence in summary process cannot be considered on appeal unless all surrounding circumstances set forth in bill of exceptions, 102 C 692
may be served and returned as any other civil process, 104 C 112
better practice to incorporate copy of record in writ, but writ *held* not abatable for failure to do so, 104 C 112
certification of evidence improper where bill of exceptions is only source of information as to facts, 104 C 112
assignments of error must be distinct and specific, 104 C 112
in summary process bill of exceptions presumed to state all essential facts, 104 C 291
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bill of exceptions abolished since 1806 except in summary process, 108 C 143
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service and return of writ of error to Supreme Court, 125 C 547
court refused to consider claim not definitely assigned in writ, 125 C 552

WRITS

See MANDAMUS; NE EXEAT; PROCESS; PROHIBITION;
QUO WARRANTO

WRONGFUL DEATH

See DEATH BY WRONGFUL ACT

YALE UNIVERSITY

See COLLEGES AND UNIVERSITIES

ZONING

- § 1. IN GENERAL; VALIDITY OF ZONING ORDINANCES
2. CONSTRUCTION; VIOLATIONS; ENFORCEMENT
 3. NONCONFORMING USES; EXCEPTIONS
 4. VARIATIONS
 5. CHANGE IN CLASSIFICATION
 6. POWER OF BOARD OF APPEALS TO REVERSE FORMER DECISION
 7. APPEAL TO THE COURTS
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See also GASOLINE STATIONS

§ 1. In General; Validity of Zoning Ordinances

- right to injunction where building being used for business purposes contrary to zoning ordinances, 106 C 475
- special injury must be shown, 106 C 475
 - this may consist of noise, disturbance, etc., 106 C 475
- zoning legislation is proper exercise of the police power within proper limitations, 110 C 92
- even though property to be taken or use restricted, 110 C 92
 - law will not be held unconstitutional unless clearly so, 110 C 92
 - courts will not interfere where improper character of law is fairly debatable, 110 C 93
 - forbidding use in particular zone noxious because of odor, dust, gas or smoke upheld as means to protect health and promote general welfare, 110 C 93
 - where under ordinance forbidding continuance of use of building for prohibited trade after 50 per cent of value was destroyed by fire, this occurred and subsequently location was put into another zone where use entirely forbidden, officer of company thereafter continuing use *held* liable to prosecution, 110 C 93
- a business not a nuisance per se may be forbidden in particular circumstances and locations, 110 C 93
- treating used barrels in order to restore them to use, resulting in odors and smoke, 110 C 98
 - effect of permit to build in existence when law is adopted, 110 C 103
- action for injunction to restrain violation of zoning ordinance by landowner suffering special injury, 110 C 130
- where most of injury occurred only after building was erected, not laches not to apply for injunction before it was built, 110 C 130
 - decree modified to forbid only uses prohibited by ordinance in particular zone, 110 C 130

it is a necessary inference that exclusion of most business uses from residential zone bears a reasonable relation to health and public welfare, 110 C 130

—hence exclusion is within the police power, 110 C 130

possession of permit and making of contracts before ordinance took effect does not constitute vested right, invalidating an ordinance of general application, 110 C 130

where one did not come within terms of particular exemption, and that is severable, he cannot complain that it creates an invasion of the equal protection of the laws, 110 C 130

zoning ordinance upheld as constitutional, 111 C 616

—party who proceeds under ordinance cannot raise question, 111 C 626

absence of penalties for breach of regulations does not make them nugatory, 112 C 237

—town can enforce them by injunction or other legal relief, 112 C 237

—power to enforce is implied, 112 C 243

where the act giving building inspector power to enforce regulations was void under McCook case for lack of Governor's approval within constitutional time, he could act after re-enactment of the law in 1929, 112 C 237

act may give power to council of town to enact regulation or have them appoint commission which has that power, 112 C 243

owner must submit to restrictive provisions in a building code if they are constitutional, 115 C 406

—such restrictions are in the exercise of the police power, 115 C 406

mandamus will not issue to compel giving of building permit unless right of relator is clear, 115 C 406

—nor will it issue where matter is in discretion of commission, 115 C 406

—nor upon ground that provision in ordinance is unconstitutional, 115 C 406

1931 act authorizing town to appoint zoning commission, permits towns to do so but does not require them; if commission is set

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- up it is act of town not of Legislature, 118 C 6
- if power is exercised, town may thereafter terminate the commission and zoning system in like manner, 118 C 6
- vote of town of Madison repealing former action in appointing commission *held* to terminate zoning system in town, 118 C 6
- Home Rule Act giving power to town to make rules relating to construction of buildings does not include zoning, 118 C 6
- selling gasoline not business or privilege to be exercised only by public grant, 118 C 174
- is common right to be exercised by competent person conformably with reasonable regulations, such as pertain to public health and safety, 118 C 174
- provision of statute that board must find public convenience and necessity for proposed location not proper regulatory measure and unconstitutional, 118 C 174
- individual hardship and loss a necessary accompaniment of zoning in any community, 119 C 185
- such loss must be borne to make possible the broader advantages secured to community as a whole, 119 C 185
- amendment by town plan commission of zoning ordinance designating site for erection of garbage incineration plant in residential zone, 123 C 257
- held* action not unjust, arbitrary, unreasonable or abuse of discretion and would result in increase of property values of district, 123 C 257
- latter finding decisive of claim that amendment works unconstitutional taking of property of plaintiff without compensation, 123 C 258
- regulation may result to some extent in taking of property and yet not be deemed confiscatory or unreasonable, 123 C 258
- as in present case where establishment of incineration plant was in promotion of public welfare, 123 C 258
- zoning regulations are adopted in exercise of police power of State and to be valid must have rational relation to health, safety, and welfare of community, 123 C 276
- where they serve these purposes, that their adoption causes loss to individual no reason to hold them invalid, 123 C 276
- but where value of property of individual is seriously affected by regulation especially applicable to it, whether regulation in fact tends to serve these purposes must be carefully considered, 123 C 276
- one of essential purposes of zoning regulations is to stabilize property uses, 123 C 277
- authority in mayor of city of New Haven to act upon applications for certificates of approval of location of gasoline stations

and not in board of zoning appeals, 123 C 311

- history of legislation reviewed, 123 C 311
- power to adopt zoning regulations finds its justification in police power, 125 C 482
- primary purpose of zoning is to promote health, safety, welfare and prosperity of community, 126 C 238
- board of appeals in acting on application for location of gasoline station is not acting under zoning regulations, but as local authority constituted by statute, 128 C 354

§ 2. Construction; Violations; Enforcement

meaning of word “farming” as used in Zoning Act, 113 C 49

- maintaining large hen house on small tract in residential zone *held* not to constitute farming, 113 C 49
- general purpose of zoning regulations, 113 C 53
- where regulations contained no penalty provision, injunction is proper remedy to enforce them, 115 C 581
- not necessary that building inspector order cessation of use with opportunity for appeal, 115 C 581
- in construing zoning regulations, object of restrictions and exceptions is to be considered, 115 C 585
- when injunction lies for violation of ordinance fixing no penalty, 117 C 247
- damage by way of impairment of value or otherwise essential to right of individual to enforce zoning ordinance by injunction, 122 C 571
- as plaintiff did not claim that proposed addition was permitted by regulations, building inspector could take no other course than refuse certificate of occupancy, 123 C 471
- zoning board of appeals in error in refusing to grant application for certificate for change of use to junk yard, 124 C 53
- ordinance forbidding places for sale of alcoholic beverages within fifteen hundred feet of each other, and providing that, if such an existing use has been discontinued for thirty days, it could not be resumed except in conformity to the ordinance, considered, 125 C 266
- mere fact that liquor had not been sold on premises for thirty-eight days did not show discontinuance as matter of law, but would be question of fact, 125 C 266
- prohibition against garage or gasoline station whose entrance within two hundred feet of school, 125 C 715
- where school property less than but school building more than two hundred feet from proposed gas station, it came within prohibition, 125 C 715

plaintiff claimed right to use lot on mainland for parking as "accessory" use "on same lot" with buildings on island, by virtue of grants allowing owners to build seawalls between high and low-water mark, 126 C 228

—as no walls had ever been built plaintiff had no title beyond high-water mark and mainland and island not so connected as to constitute one lot under regulations, 126 C 228

—and could not be under grants, in view of provision that navigation between them should not be impeded, 126 C 235

premises determined not to be within zoned area, 127 C 409

—though inhabitants and plaintiff believed premises within zoned area, because of lack of prejudice to anyone from failure to have issue determined, no basis for estoppel, 127 C 409

§ 3. Nonconforming Uses; Exceptions

building culvert and filling ravine as beginning of construction of gas station within exception to ordinance of buildings whose construction had been begun, 109 C 422

—court bound to assume intent in ordinance to do equity, 109 C 427

—where construction had been enjoined, and ordinance allowed one year from date of enactment to complete building begun, Supreme Court allowed further time beyond year so that owner would have year exclusive of time he was enjoined, 109 C 422

where town contained city within its limits which had provision for building permits and ordinance excepted anyone who had received permit for building, one living outside city, where no provision for building permit applied, is not within exception, 110 C 130

Norwich zoning ordinance construed, 111 C 616

—refusal to permit gasoline station as extension of nonconforming use upheld, 111 C 616

New Britain ordinance *held* to give no right to other property owner to ruling as to permissible use of building, 112 C 25

—on facts *held* no abandonment of nonconforming use for one year, 112 C 25

power to permit extension of nonconforming use does not extend to separate lots, though originally part of common tract, 113 C 57

purpose of zoning ordinances, 114 C 15

—nonconforming uses should be reduced to conformity as completely and speedily as possible, 114 C 15

—where suppression not feasible without working substantial injustice, greatest pos-

sible amelioration of use should be made, 114 C 15

replacing nonconforming building by new structure twice as large is a radical departure from policy of law not justified by improved appearance of premises or more advantageous financial return to owner, 114 C 15

ultimate object of zoning is to confine certain classes of buildings and uses to designated localities, 115 C 581

—the accepted method of accomplishing this is to take advantage of any change in use made or contemplated to suppress nonconformity, 115 C 581

—where ordinance provided that nonconforming uses might be continued, change from restaurant to residence for two years would not permit restoration of business use thereafter, 115 C 581

—temporary interruption of nonconforming use without substituted conforming use or abandoning former use would not prevent resumption of it, 115 C 586

informal permission given by building inspector to relay floor for use as tearoom *held* not sufficient to establish estoppel to action for injunction against nonconforming use, 115 C 588

regulations contained exception that they should not apply to building where foundations were started; amendment forbade apartments; *held* amendment applied to apartment not within exception, 119 C 182

—any loss from plans and arrangements for building having been made were damnum absque injuria, 119 C 182

—and allegations of complaint showed no sufficient basis for claim that amendment was invalid, 119 C 182

regulations contemplate that nonconforming uses be reduced to conformity as speedily as possible, and in no case be allowed to increase, 120 C 449

reconstruction of nonconforming building destroyed by fire "as it was prior to such destruction" does not require exact reproduction, 120 C 449

—but where proposed new building would have 25 per cent increased frontage, *held* board of appeals did not act arbitrarily in holding this was not a reconstruction, 120 C 449

action of building inspector in requesting appellants to await outcome of pending suit, etc., did not stop town from relying on fact that proposed building could not be constructed within one year from destruction of old, as limited by regulations, 120 C 450

board under no duty to grant rehearing, or make suggestion as to how plans should

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- be changed, or grant permit upon condition that they be changed, 120 C 454
- regulations provided that existing nonconforming use could be continued but not if it diminished extent of conforming use or cost of alteration exceeded 50 per cent of assessed valuation, 122 C 435
- alteration of dormitory which was nonconforming use into apartment not affected by first prohibition as existing use was entirely nonconforming, 122 C 435
- but court's conclusion that alteration would exceed 50 per cent of assessed value sustained, 122 C 435
- temporary interruption or suspension of nonconforming use without substitution of conforming one or such definite departure from previously existing conditions and uses as to signify abandonment of latter, does not terminate right to resume them, 122 C 571
- property *held* not devoted to conforming use (residential) in substitution of nonconforming (airport) so that latter could not be continued under ordinance, 122 C 571
- where entire premises were devoted solely to airport uses, extension of uses to include air-meets did not diminish any conforming use, as forbidden by ordinance, 122 C 571
- nonconforming use of leased premises not "discontinued" by mere temporary suspension for reasonable time for reasons beyond owner's control where there is manifest intention to resume as soon as tenant can be obtained, 127 C 239
- so where owner manifested intention to continue package store use by purchase and retention of fixtures and efforts to rent for that purpose, even while temporarily renting to photographer, 127 C 239
- prohibition against gas station within two hundred feet of church except with permission of board of appeals with appropriate conditions and safeguards; permission given without safeguards voidable, 127 C 716

§ 4. Variations

- action of board of appeals in refusing to modify application to permit erection of gasoline station on ground of unreasonable hardship, sustained, 111 C 616
- duty of board of appeals in amelioration of unnecessary hardships which, owing to special conditions, would result from a literal enforcement, 111 C 620
- where board of appeals nominally refuses application for variation in use from that permitted because of opposition of property owners, this no ground for relief where that opposition was based on injury to property, 113 C 684

- purpose of board of appeals, 113 C 684, 114 C 22
- has no power to repeal, modify or amend ordinances, 113 C 685
- where property is purchased years after zoning ordinance has gone into effect and permission to use it for prohibited purpose would seriously damage other property owners, board may refuse permission, 113 C 684
- proposal by gas company to erect hortonsphere on property purchased with full knowledge of existing regulations; refusal of board to permit variation when substantial injury would result *held* not unreasonable, 113 C 684
- disadvantage to single owner does not ordinarily warrant relaxation in his favor on ground of practical difficulty and unnecessary hardship, 114 C 15
- variances ordinarily are required to be in substantial harmony with general purposes and intent of ordinances, 114 C 15
- facts showing financial benefit to landowner by removal of restrictions do not of themselves constitute practical difficulties under ordinances permitting commission to vary provisions, 115 C 406
- remedial and beneficial character of general provisions authorizing zoning board of appeals to vary strict letter of regulations in proper case, 120 C 291, 125 C 483, 723
- board sustained in finding that no hardship would result in strict enforcement of requirement that nonconforming building destroyed by fire could be reconstructed as it was before destruction, and in refusing to grant variation, 120 C 450
- power of authorizing variations from general provisions of zoning ordinance to be sparingly exercised, 124 C 525
- disadvantage in property value or income to single owner does not warrant relaxation on ground of practical difficulty or unnecessary hardship, 124 C 525
- conclusion of court that evidence before board did not warrant finding of "practical difficulties or unnecessary hardship" sustained, 124 C 525
- provision construed to permit board of appeals to vary prohibition concerning distance from school as to garage but not as to gasoline station, 125 C 715
- and it could not thus vary regulations under general power given it, 125 C 715
- power to authorize variations is granted only for relief in specific and exceptional instances; is to be sparingly exercised, 126 C 228
- disadvantage in property value or income or both to single owner does not ordinarily warrant relaxation on ground of practical

difficulty or unnecessary hardship; but is element to be considered, 126 C 229

—where variation of restriction against parking would financially benefit owner, but value of surrounding high grade residences would be depreciated and comfortable and peaceful occupation of homes subverted, board properly refused application, 126 C 229

fundamental revisions are for common council; variations in special cases for board of appeals, 127 C 278

variance by board of appeals to be sparingly used, 127 C 278

in determining whether there is practical difficulty or unnecessary hardship justifying relaxation of regulations there is balancing of general public interests and those of individual, 127 C 307

—public interest outweighed loss to plaintiff from spending substantial sum in renovating building for mortuary parlor, 127 C 311

disadvantage to one property owner does not warrant relaxation in his favor on ground of practical difficulty or unnecessary hardship, 129 C 280

—principle applied to tavern owner desiring to get full liquor permit where prevented by zoning ordinance, 129 C 280

zoning authority has no right to regard prevention of competition as factor in administering law, 129 C 280

—record did not bear out court's assumption that objections of competitors were basis of denial of application, 129 C 280

failure of board in granting application to vary restrictions to state upon its records the reason why change was made in accordance with statute did not invalidate its action, 129 C 285

power of authorizing variations should be sparingly exercised and only under exceptional circumstances, 129 C 286

action of board in concluding that to enforce fifteen hundred feet rule against applicants whose restaurant with liquor permit had been closed through condemnation would impose unreasonable hardship upon them, sustained, 129 C 286

§ 5. Change in Classification

vote making change not necessarily invalid as whole because of its unlawful effect upon property of one person, 123 C 276

ordinarily change involving only single or very few properties should be made only where new or additional facts appear, or other considerations materially affecting the merits intervene, 123 C 276

—so where rezoning at intersection from business to residential zone would affect only one property which would be depre-

ciated 70 per cent and owner had made substantial improvements relying on original plan, since which there had been no substantial change in neighborhood, *held* such change not reasonably voted, 123 C 276

—that increase in value of other properties would result would not in itself justify change, 123 C 288

action for declaratory judgment that change of zone from light industrial to residential B was invalid, 123 C 468

—where change was invalid by reason of lack of statutory notice, plaintiff did not waive right to assert invalidity by instituting various proceedings to reclassify property not knowing of invalidity of attempted change, 123 C 468

—change affected small area and less than two years elapsed to bringing of present suit; *held* no prejudice as would create an estoppel, 123 C 469

§ 6. Power of Board of Appeals to Reverse Former Decision

board of appeals should not ordinarily be permitted to review its decisions and revoke action once taken, 113 C 132

—but this may be permitted where conditions have changed, 113 C 132

—granting of permission to establish parking station after refusal of earlier application upheld where need for parking space had increased, 113 C 132

power of zoning board of appeals to reconsider its action and reverse former decision, 120 C 287

—should not be interpreted with too much refinement nor should it be hedged about with technicalities, 120 C 287

—power is not an arbitrary one and should be exercised only when there is justification and good cause, 120 C 287

—its discretion is subject to review, 120 C 287

—should not ordinarily reverse action once taken, as this would lead to uncertainty and impermanence, 120 C 287

—to make changes in condition of property material they should be confined to immediate vicinity, 120 C 287

—so where only changes in property in the eight months between hearings were partial discontinuance of trolley service, erection of gas station, dance hall, etc., about half mile away, *held* no sanction for reversal of former decision denying permit for gas station, 120 C 287

zoning board of appeals acts in quasi-judicial capacity, 120 C 292

—is an appellate tribunal and its decisions are reached only after the presentation of

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evidence deemed to warrant such action, 120 C 292

while board of appeals has liberal discretion to decide whether to reverse a former decision, such discretion is subject to review by courts and it must be reasonably and legally exercised, 127 C 272

—test is whether new or additional facts appear showing a change of conditions since former decision, 127 C 272

—where no material changes occurred, reversal of decision of four years previous denying application for variation was arbitrary and illegal, 127 C 272

discretion of board to reverse former decision subject to review; should not ordinarily be permitted to review its own decisions and revoke action once duly taken, 127 C 307

§ 7. Appeal to the Courts

failure to take advantage by appeal of procedural irregularities under Zoning Act waives them, 112 C 237

—so failure to attack constitutionality of act when parties had opportunity to do so, 112 C 237

appeal under act does not permit attack upon its constitutionality, 113 C 49

—on appeal, question is whether board acted arbitrarily or so unreasonably as to abuse discretion, 113 C 58, 120 C 449

function of court in reviewing decision of board of appeals, 113 C 135

—purpose and function of such a board, 113 C 139

—presumption that it had acted properly, 113 C 139, 114 C 15, 123 C 275, 124 C 57

—effect of granting permission to applicant to withdraw, 113 C 140

on appeal to court, property owners having special interest properly admitted as parties, 113 C 684

evidence of individual views of one member of zoning board of appeals does not show reasons on which it acted, 114 C 15, 124 C 531

—where record does not disclose grounds on which board acted, question on appeal was whether facts showed reasonable ground within the limits of its power for action by the board, 114 C 21

appeal from action of zoning board of appeals in granting license to sell gasoline, improperly taken to Court of Common Pleas, and appeal properly stricken from docket, 116 C 553

—proceeding was one under gasoline statutes not zoning regulations, 116 C 553

—particular provisions in gasoline statutes constitute exception to general provisions in zoning laws de appeal to either court, 116 C 553

appeal from action of zoning board of appeals (Hartford) denying application for variation of application of clause excluding parking station from business zone, 117 C 527

—decision of board administrative act and does not permit court by trial de novo to substitute its findings and conclusions, 117 C 527

—court's function limited to determination whether board acted arbitrarily or illegally or abused discretion, 117 C 527

—issue presented by application was whether variation should be granted, 117 C 527

—and facts found by court and subsidiary conclusions pertaining to continuation or permissible change in nonconforming use were inappropriate to this issue, 117 C 527

—and inadequate to support conclusion that board had no discretion but to issue permit, 117 C 527

—facts disclosed in memorandum of decision showed factual support for conclusion of board, 117 C 527

while board of appeals must exercise its powers with skill, sound judgment and probity, it has a liberal discretion, 117 C 533

burden of proof to show zoning board of appeals acted improperly in approving location for sale of gasoline is on appellant, 118 C 174

—and where he has no proof, finding by court that board complied with all requirements of statute will not be corrected, 118 C 174

not necessary that board of appeals make formal finding of facts on which its action is based, 118 C 174, 124 C 530

—is administrative body and less formality is expected, 118 C 174, 124 C 530

—but desirable that minutes contain full and complete statement of action of board, for benefit of court on appeal, 118 C 174, 124 C 530

where it was alleged in the appeal and admitted by answer that zoning board of appeals granted application, appellant estopped from claiming it did not, 118 C 178

power of court, upon appeal from zoning board of appeals, does not include power to substitute its discretion for that of board, 120 C 450

court not obliged to give credence to plaintiff's unsubstantiated estimate of cost of proposed alteration in appeal from zoning board of appeals, 122 C 439

there is presumption that a zoning commission has acted with fair and proper motives, skill and judgment, 123 C 275

—which would prevail in absence of showing of facts relevant to validity of its action or where facts appear sufficient in them-

selves to sustain reasonableness of conclusion reached by it, 123 C 275

upon appeal from decision of commission to court it is function of court itself to find relevant facts and it must determine on basis of them whether action was reasonable, 123 C 275

principle denying one taking zoning appeal right to question validity of regulation based on reason that appeal itself would have no basis if regulation void, 123 C 469

—but resort to appeal does not itself preclude attack on ordinance in subsequent independent proceeding, 123 C 469

—question presented to be resolved on principle of election of remedies, 123 C 469

—plaintiff *held* entitled to abandon proceedings before local authorities and seek direct relief in courts, 123 C 470

where no provision for appeal, no question of propriety of action of board of building commissioners could be presented to zoning board of appeals or by appeal to court from it, 123 C 471

where there would be no occasion to vary application of regulations if attempted change in regulations finally held invalid, the appeal as to this point not determined but continued on docket, 123 C 471

case remanded with direction that judgment, which simply directed board to issue certificate of occupancy, be modified to order this be done under such terms and conditions as board might prescribe, 124 C 54

when it does not appear on appeal what conclusions commission reached, court can only, by hearing evidence or by reference, determine what facts were and assume commission had those facts before it, 124 C 57

on appeal, decision of administrative board may be attacked on ground that it was not warranted by facts appearing in board's records, or that conclusion could not be reasonably reached on evidence before it or no basis of determination by court of what facts really were, 124 C 525

appeal to courts from decision of administrative board is process to determine whether board has acted arbitrarily or illegally or so unreasonably as to have abused discretion, 126 C 237

—discretion a liberal one, to be overruled only when board has not acted fairly with proper motives and valid reasons, 126 C 237

statute granting right to new action within year where original action failed to be tried on merits because writ was abated, does not apply to appeal from zoning board, 126 C 603

appeal from zoning board of appeals to Superior Court from denial of petition to revoke order permitting nonconforming use

lacked proper basis, where board had no such original power under charter, 126 C 648

zoning board proper party in appeal from order it makes and may appeal to Supreme Court, 127 C 16

—municipality as party, 127 C 21

—service of process on board, 127 C 23

—other parties having direct interest should be summoned in, 127 C 23

while board of appeals has liberal discretion to decide whether to reverse a former decision, such discretion is subject to review by courts and it must be reasonably and legally exercised, 127 C 272

discretion of board to reverse former decision subject to review; should not ordinarily be permitted to review its own decisions and revoke action once duly taken, 127 C 307

right of appeal given by charter not contingent upon restraining order which appellant may apply for, 127 C 309

court not permitted to substitute its own discretion for that of board of appeals, 127 C 310

Superior Court uses facts assumed to have been those before board as basis for testing its conclusions, 129 C 282

§ 8. Procedural Matters

requirement that plans be filed for fifteen days and then a hearing had does not preclude making of slight changes after hearing without refile, 112 C 237

estoppel, where private and public rights have become established, to attack irregularities, 112 C 237

requirement for publication of ordinance not met by notice referring to previous publication of proposed ordinance and then stating certain changes made in it, 113 C 776

city not liable for cost of proceedings brought by individual specially injured to restrain breach of building regulations, 115 C 700

while not legally necessary for board to make formal finding, statement in its minutes with such particularity as to enable court clearly to understand what was done is desirable, 118 C 174, 124 C 530

zoning board and adjustment board without jurisdiction to hear application for building permit where such application is not to be made to them but to official charged with duty of enforcing regulations, 119 C 182

board not obliged to give reasons for decision nor make formal finding of facts, though it is wise and proper to do so, 120 C 454

statutory requirements fixing manner in which zoning changes shall be made should not be readily relaxed, 123 C 275

when it is required that certain action can be taken only by unanimous vote of zoning

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authority and there is no further restriction, it is sufficient if all those at meeting constituting quorum shall vote for it, 123 C 275

provision that if protest is filed, no change in regulation or boundaries effective "except by unanimous vote of zoning authority if such zoning authority is a zoning commission, or a vote of three-fourths of all the members of any other zoning authority," 123 C 275

—held to mean vote of all members of zoning commission in favor of such change as distinguished from all members present at meeting duly called and constituting quorum, 123 C 275

while statute does not in terms require that all members of commission shall attend public hearing on application for such change, it is advisable they should attend, 123 C 275

in absence of provision for stated meetings, adjournment without day is notice to all that matters which had been under consideration will not be taken up unless initiated under procedure for new business, 123 C 275

where city was defendant plaintiff not bound to join all others whose rights might be affected by decision as parties, though they might be entitled to intervene, 123 C 470

—but under declaratory judgment rules such others must be made parties or have reasonable notice, and where neither was done plaintiff denied declaratory judgment, 123 C 471

while not strictly necessary for zoning board of appeals to give reasons for its actions, it is good practice to do so and helpful in interpreting its motives, 124 C 53

action of zoning board of appeals taken in executive session by four of its five members

not invalid because full membership did not participate, 125 C 714

hearings before board of appeals must be public; deliberations thereafter often should be private, 125 C 714

nothing irregular in hearing two applications de same subject-matter at same time, 125 C 714

where charter of New Haven contemplated that change in permissible use must first be acted on by building inspector, zoning board of appeals could not reserve to itself right at any time to revoke permission granted for nonconforming use, 126 C 648

—but board could make it condition of granting of permission that use should not constitute nuisance, 126 C 648

—proper way to raise question of whether condition was violated is by petition to building inspector that he make order forbidding such use, 126 C 648

—appeal to Superior Court from denial of plaintiff's petition to zoning board of appeals to revoke order lacked proper basis, 126 C 648

charter provision that board should keep minutes showing vote of each member on every question applies only to ultimate question not to each subsidiary claim, 127 C 308

where appeal taken from decision permitting variation without knowledge of permittee, he acquired no vested right by virtue of fact that no restraining order was obtained, 127 C 308

plaintiff did not waive right to bring action for declaratory judgment by previously seeking permission from zoning authority to alter building, 127 C 409

where plaintiff's property not within zoned area he is in no position to attack zoning ordinance, 127 C 413

OBITUARIES AND BIOGRAPHIES APPEARING IN CONNECTICUT REPORTS

In Volume 13, 14 and 15, the reporter, Thomas Day, inserted brief notices of lawyers of his day and of the period immediately preceding. These will be found in the original editions of these reports but are omitted from some of the reprints.

Volume 13 contains notices of the following lawyers: Simeon Baldwin, David S. Boardman, Samuel Bostwick, Jonathan Brace, David Daggett, Theodore Dwight, Daniel Everitt, Sylvester Gilbert, Hezekiah Huntington, Nicholas S. Masters, Stephen Mix Mitchell, Samuel D. Orton, Nathaniel Perry, Augustus Pettibone, Philo Ruggles, David C. Sanford, John Cotton Smith, Perry Smith, Nathaniel Terry, Patridge Thatcher, Thomas S. Williams, Daniel B. Wilson.

Volume 14 contains the following: Seth P. Beers, Samuel Church, Calvin Goddard, Roger Minot Sherman, Noah Webster, Calvin Willey.

Volume 15 contains the following: Noah B. Benedict, Calvin Butler, Judson Canfield, Jonathan Edwards, Elizur Goodrich, William Hawley, Jabez W. Huntington, Jirah Isham, James Lanman, Mathew Minor, Jr., Walter Mitchell, Joseph M. Palmer, Charles B. Phelps, Timothy Pitkin, Nathan Preston, Nathaniel Smith, William Lucius Storrs, Henry Strong, John Strong, Jr., Hezekiah Thompson, Joseph Trumbull, Henry M. Waite.

The obituary sketches commence with the twentieth volume and are as follows:

AMBLER, RICHARD CHARLES	60 C 608	BOOTH, JOHN RICHARDS	129 C 715
ANDREWS, CHARLES BARTLETT	75 C 729	BOOTH, REUBEN	19 C 159
ANDREWS, JAMES PARKHILL	122 C 671	BRANDEGEE, AUGUSTUS	78 C 723
ARVINE, EARL LISS PORTER	89 C 718	BREWSTER, LYMAN DENISON	76 C 713
AVERILL, ERNEST LEROY	129 C 711	BRISCOE, CHARLES HENRY	92 C 714
AVERILL, ROGER	50 C 620	BRISCOE, WILLIS ANSON	87 C 713
BACON, CLARENCE EVERETT	81 C 726	BRISTOL, LOUIS H.	83 C 721
BACON, FRANCIS	19 C 509	BROCKWAY, JOHN HALL	36 C 588
BALDWIN, ROGER SHERMAN	30 C 609	BROSMITH, WILLIAM	124 C 697
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BARBOUR, JOSEPH LANE	89 C 721	BULLOCK, ISRAEL M.	46 C 611
BARNES, JONATHAN	29 C 614	BURPEE, LUCIAN FRANCIS	101 C 753
BEACH, JOHN KIMBERLY	126 C 719	BUTLER, THOMAS BELDEN	39 C 601
BEACH, JOHN SHELDON	55 C 603	CALHOUN, DAVID SAMUEL	87 C 712
BEARDSLEY, MORRIS BEACH	99 C 736	CANFIELD, CHARLES STUART	106 C 743
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